No. 09-1380

IN THE

Supreme Court of the United States

THE NATIONAL FOOTBALL LEAGUE,

Petitioner,

v.

KEVIN WILLIAMS AND PAT WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Kevin Williams and Pat Williams ("Williamses" or "Respondents") are professional football players employed by the National Football League ("NFL" or "Petitioner"). The Williamses play for the Minnesota Vikings. The NFL, by conducting drug testing in the State of Minnesota, had an obligation to know and to abide by Minnesota State drug testing laws. It failed in both regards.

The NFL contends that § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, preempts certain Minnesota state statutory claims which regulate drug testing. The NFL is wrong. The federal district court considered the NFL's arguments and defenses; determined that the Williamses' claims were not preempted by the LMRA; and properly remanded the state law claims to state court.

A bench trial was held on claims brought under the Drug and Alcohol Testing in the Workplace Act ("DATWA"), Minn. Stat. § 181.950-957. Pet. App. 93a-114a. The NFL was found to have violated DATWA but the trial court declined to continue the injunction that prevented the NFL from suspending the Williamses. The Williamses have appealed whether it was error for the trial court to decline to issue a permanent injunction in light of the NFL's violation of DATWA. Briefing in the Minnesota Court of Appeals is complete and the parties await oral argument.

The question presented is whether this Court should exercise *certiorari* review where (a) the underlying dispute could be rendered moot within a few months by affirmance of the Minnesota appellate courts of the decision allowing for the suspension of

the Williamses; (b) a threshold jurisdictional defect precludes this Court's review altogether because, under 28 U.S.C. § 1447(d), appeals from orders remanding cases to state courts are not appealable, notwithstanding this Court's holding to the contrary in *Carlsbad Tech., Inc. v. HIF BIO, Inc.*, __ U.S. __, 129 S. Ct. 1862 (2009), premised on *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), which "was questionable in its day and is ripe for reconsideration in the appropriate case," *Carlsbad*, 129 S. Ct. at 1868 (Scalia, J., concurring); (c) where the question purportedly presented by the Petition — whether defenses are relevant in a § 301 preemption analysis — arises only in connection with a claim brought pursuant to the Lawful Consumable Products Act ("LCPA"), Minn. Stat. § 181.938, on which the NFL obtained summary judgment in a ruling from which the Williamses have not appealed; and (d) no circuit split is presented.

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to this proceeding.

The National Football League Players Association, the National Football League Management Council, Adolpho Birch, Dr. John Lombardo, and Dr. Brian Finkle were parties in the consolidated proceedings below, but are neither petitioners nor respondents in this Court.

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Kevin Williams and Pat Williams respectfully submit this brief in opposition to the Petition filed by the NFL.

The Petition should be denied because it may well be rendered moot before the Court could render a decision on the merits; because the Court lacks jurisdiction over the appeal under 28 U.S.C. § 1447(d); because the question purportedly presented is not actually presented given the NFL's state court victory on respondents' LCPA claims; and, because there is no relevant disagreement among the courts of appeals requiring the Court's resolution.

OPINION BELOW

The opinion of the court of appeals is reported at 582 F.3d 863. Pet. App. 1a. The court of appeals decision denying rehearing and rehearing *en banc* is reported at 598 F.3d 932. Pet. App. 66a. The final judgment of the district court is reported at 654 F. Supp. 2d 960. Pet. App. 42a.

JURISDICTION

The judgment below was entered on September 11, 2009. Pet. App. 1a. Petitions for rehearing and rehearing *en banc* were denied on December 14, 2009. Pet. App. 66a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The underlying facts of this case are undisputed. For two years, the NFL possessed scientific evidence that a seemingly innocuous, over-the-counter product called StarCaps contained an undisclosed,

potentially lethal controlled substance called Bumetanide. Bumetanide is on the NFL's list of prohibited substances, but nothing on the label or packaging of StarCaps indicates that Bumetanide is present in the product. Res. App. 4a at 22. Neither of the Williamses has ever taken steroids or performance enhancing drugs. Res. App. 2a-3a at 7, 16 .

The NFL knew since 2005 that NFL players were using StarCaps yet failed to disclose the health risk, or the risk that usage violated the NFL steroid policy, to players, including the Williamses, and then, starting in 2008, punished players for using that product without any notice or explanation. The NFL contends that it was defending its strict liability steroid policy by suspending the Williamses. Lower federal and state courts have all rejected the NFL's defense since it has been proved that the NFL had a "secret policy" not to suspend NFL players who tested positive for Bumetanide from as early as 2005 until sometime in 2008.

In July and August 2008, the Williamses and other NFL players tested positive for Bumetanide. Reversing years of policy — and playing what the Minnesota state trial court, after a bench trial, characterized as "a game of gotcha" — the NFL suspended the Williamses for four games without pay. Res. App. 21a at 154.

The NFL detected usage of StarCaps by invoking a drug testing procedure that indisputably and materially violated DATWA. The NFL's conduct also violated the clear public policy of Minnesota. Minnesota has a right to police the NFL's drug testing activity in Minnesota.

PROCEDURAL HISTORY

The NFL and the National Football League Players Association ("NFLPA") are party to a nationwide collective bargaining agreement ("CBA"), which incorporates the NFL Policy on Anabolic Steroids and Related Substances (the "Policy"). Pet. App. 115a–157a. The CBA affords players a right to appeal drug-related suspensions. That appeal was heard by NFL Vice President and General Counsel Jeff Pash on November 20, 2008. On December 2, 2008, Pash issued a decision upholding the suspensions. Pet. App. 77a-91a.

On December 3, 2008, the day after the NFL issued an arbitration decision suspending the Williamses for four games for their alleged violation of the NFL's Policy, the Williamses filed an action in District Court of the Fourth Judicial District of the State of Minnesota for the County of Hennepin and sought injunctive relief. Following extensive oral argument, a temporary restraining order against the NFL's suspensions was granted.

On December 4, 2008, the NFL removed the matter to the United States District Court for the District of Minnesota.[1] Following summary judgment

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[1] The Williamses originally sued the NFL and certain NFL representatives for fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, violations of public policy, constructive fraud, negligent misrepresentation, negligence, gross negligence, vicarious liability under the doctrine of *respondeat superior*. Since the NFL removed the case to federal court the day after the Williamses' state court filing, the Williamses' amendment of the complaint to include

[Footnote continued on next page]

motions in federal court, Honorable Paul A. Magnuson, on May 22, 2009, ruled that the Williamses' common law claims were preempted by § 301 of the LMRA but that the DATWA and LCPA claims were not preempted. On May 22, 2009, the district court remanded the DATWA and LCPA claims to state court, declining to exercise supplemental jurisdiction over them because they raised significant questions about "the public policy of the state of Minnesota." Pet. App. 64a.

The United States Court of Appeals for the Eighth Circuit affirmed the district court in all respects. With regard to the DATWA claims, the court noted that "section 301 does not preempt state law claims merely because the parties involved are subject to a CBA and the events underlying the claim occurred on the job." Pet. App. 15a-16a. Because "a court would have no need to consult the Policy in order to resolve the players' DATWA claim," and because the NFL could "not point to a specific provision of the CBA or the Policy which must be interpreted," the court of appeals concluded that the Williamses' DATWA claims were not preempted by § 301. Pet. App. 19a, 22a. The NFL's petitions for rehearing and rehearing *en banc* were denied on December 14, 2009. Pet. App. 66a-77a.

[Footnote continued from previous page]
claims under DATWA and the LCPA, on January 2, 2009, occurred while the case was in federal court.

The state trial was held from March 8 through March 12, 2010.[2] The court issued findings of fact and conclusions of law on May 6, 2010, holding that the NFL had violated DATWA's three-day notice provision for notifying players of a positive test, but refusing to enjoin the NFL permanently from suspending the Williamses. Res. App. 1a-37a. The court concluded that "Kevin Williams and Pat Williams were not harmed by Defendant NFL's DATWA violation," and therefore "[p]laintiffs failed to establish success on the merits." Res. App. 23a, 36a.

On May 21, 2010, after the Williamses requested a stay of the order pending appeal, Judge Larson refused to dissolve the temporary restraining order pending appeal and stayed entry of the final order pending appeal of the order refusing to dissolve the injunction. Res. App. 38a-49a.

The Williamses appealed from the May 6, 2010 order to the Minnesota Court of Appeals on May 25, 2010. The briefing of that appeal was completed on

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[2] DATWA provides broad protections to Minnesota employees who are subject to employer drug and alcohol testing. It establishes, *inter alia*, criteria for testing laboratories, procedures employers must follow, and disciplinary limitations for those who test positive. Minn. Stat. §§ 952-955. The LCPA prohibits employers from disciplining employees because "the employee engages in or has engaged in the use or enjoyment of lawful consumable products" — products such as StarCaps — "if the use or enjoyment takes place off the premises of the employer during nonworking hours." Minn. Stat. § 181.938.

August 30, 2010. Oral argument is expected this fall and a decision shortly thereafter. Either party can seek discretionary review in the Supreme Court of Minnesota, but otherwise judgment on the Williamses' DATWA claims will be final in all respects unless one of the parties petitions for review by this Court.

After briefing before the Minnesota Court of Appeals was fully submitted, the NFL filed a motion to dismiss the appeal on September 8, 2010, asserting that the Williamses had not properly perfected an appeal from the trial court's final judgment. The NFL claimed, *inter alia*, that the appeal was moot and that there is no justiciable controversy to be heard before the court of appeals. Res. App. 50a-61a. That motion is pending before the Minnesota Court of Appeals.

REASONS FOR DENYING THE PETITION

I. THE PETITION MAY SOON BE MOOT.

The ongoing state court litigation may soon render the Petition moot.

The Minnesota state trial court has denied the Williamses the relief they seek, a permanent injunction on the merits of the state statutory claims. *See* Pet. 6 n.1, 17 n.3 (noting that the trial court "entered judgment for the NFL" on the DATWA claims and "granted summary judgment for the NFL on the LCPA claim"). The Williamses have appealed to the Minnesota Court of Appeals from the post-trial order relating to the DATWA claims. Appellate briefing in that case was completed on August 30, 2010, and a decision is expected within a few months. Because the Minnesota Supreme Court's

review is discretionary, and because that court typically decides whether to grant review within sixty days of a decision by the Minnesota Court of Appeals, the NFL may secure a final judgment on the DATWA claims well before the end of this Court's October Term 2010.

Moreover, the NFL recently moved the Minnesota Court of Appeals to dismiss the Williamses' appeal in the state system altogether. Res. App. 56a-68a. The NFL has taken the position that, while the Williamses timely appealed the Minnesota trial court's May 6, 2010 post-trial order setting out findings of fact and conclusions of law, and although the state court stayed entry of the trial order, the Williamses did not timely appeal the final judgment entered by an administrative clerk of the Minnesota trial court on June 7, 2010, notwithstanding the court's stay order. Accordingly, the NFL's current litigation position in the Minnesota Court of Appeals is that there presently exists an unappealed "final determination of the rights of the parties" with respect to these claims. Res. App. 51a. Should the NFL's motion be granted — it is fully briefed and pending adjudication — it is even more likely that the judgment in the state system will become final before this Court receives briefing, hears oral argument, and renders a decision on the merits.

A final state court decision in the NFL's favor on the DATWA claims would render the Petition for moot. It is elementary that this Court will not decide moot disputes. *Sec. and Exchange Comm'n v. Medical Comm. for Human Rights*, 404 U.S. 403, 407 (1972) ("Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the

Constitution under which the exercise of judicial power depends upon the existence of a case or controversy") (internal quotation marks omitted). This Court will dismiss a writ of certiorari when a case becomes moot. *See Deakins v. Monaghan*, 484 U.S. 193, 199 (1988).

Although the mootness doctrine excepts the rare cases that are "capable of repetition, yet evading review," that exception applies only where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990). This exception does not apply here because "there is no reason to suppose that a subsequent case will not come with relative speed to this Court." *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974). The NFL has asserted and preserved its § 301 preemption defense in the state system, and, in the event the NFL does not prevail in the Minnesota appellate courts, it could obtain review by writ of certiorari via 28 U.S.C. § 1257(a).

Even if the NFL were correct in its assertion that there is a circuit split on the preemption issue — and, as discussed below, the NFL is wrong on this point — this Court can grant certiorari to resolve conflicts between the decisions of a highest state court and a federal court of appeals. *See, e.g.*, *Jones v. Flowers*, 547 U.S. 220 (2006) (granting certiorari to the Arkansas Supreme Court "to resolve a conflict among the Circuits and State Supreme Courts"); *United States v. Estate of Romani*, 523 U.S. 517, 521 (1998) (granting certiorari to the Pennsylvania Supreme Court where the decision of that court

"conflict[ed] with two federal Court of Appeals decisions"); *accord Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law"). As a result, the NFL could seek this Court's review were the Minnesota appellate courts to reverse the trial court and enter judgment against the NFL. Because the Petition may be rendered moot after a substantial expenditure of this Court's limited resources, certiorari is unwarranted.

II. THE COURT OF APPEALS LACKED JURISDICTION UNDER 28 U.S.C. § 1447(D).

The district court remanded the Williamses' state statutory claims to the Minnesota trial court. Under 28 U.S.C. § 1447(d), "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." Under the plain text of that section, the court of appeals lacked jurisdiction, and this Court now lacks jurisdiction, to hear petitioner's appeal from the district court's order.

Beginning in *Thermtron*, this Court has permitted appellate review of remand orders in certain types of cases despite the plain language of § 1447(d). *See Osborn v. Haley*, 549 U.S. 225 (2007); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995). Although the plain language of § 1447(d) is unambiguous, *Thermtron* held that "remand orders *are* appealable if they are based on

any grounds *other* than the mandatory ground for remand set forth in § 1447(c)" because "subsections (c) and (d) are *in pari materia* and must be construed together." *Osborn*, 549 U.S. at 263 (Scalia, J., dissenting) (emphasis in original). Thus, *Thermtron* opened the door to appeals of remand orders based on grounds *other than* lack of subject matter jurisdiction, which is a mandatory ground for remand specified in § 1447(c).

Applying *Thermtron*, this Court recently determined that an appeal can be taken from a remand order in the circumstances here, where a federal district court declines to exercise supplemental jurisdiction over state law claims. *Carlsbad*, 129 S. Ct. at 1862.

Respondents believe that *Thermtron* was incorrectly decided, that this error infected the Court's decision in *Carlsbad*, and that the Eighth Circuit therefore lacked jurisdiction over the district court's remand order. As a result, respondents intend to request reversal of *Thermtron* should the Petition in this case be granted.

Several members of the Court have suggested that *Thermtron* was wrongly decided and that Justice Rehnquist's dissent in that case was a more faithful application of the statute and the intent of Congress. *See Carlsbad*, 129 S. Ct. at 1865 n.* ("We do not revisit today whether *Thermtron* was correctly decided. Neither the brief for petitioner nor the brief for respondents explicitly asked the Court to do so here . . . "); *id.* at 1861 ("Today, as in *Thermtron*, the Court holds that § 1447(d) does not mean what it says") (Stevens, J., concurring); *id.* ("*Thermtron* was questionable in its day and is ripe for reconsideration in the appropriate case") (Scalia, J., concurring).

The remand order here comes within the plain language of § 1447(d), but the order itself is not predicated on the absence of subject matter jurisdiction. Absent the *Thermtron* gloss, the district court's remand order would be unreviewable.

Thermtron conflicts with the policy judgment Congress made about the costs and benefits of remand appeals. "Congress' purpose in barring review of all remand orders has always been very clear — to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand." *Themtron*, 423 U.S. at 354 (Rehnquist, J., dissenting). "While Congress felt that making available a federal forum in appropriate instances justifies some such interruption and delay, it obviously thought it equally important that when removal to a federal court is not warranted the case should be returned to the state court as expeditiously as possible." *Id.*

In cases where a respondent seeks to overturn this Court's prior jurisprudence, the Court has noted that "[w]e would normally expect notice of an intent...in the respondent's opposition to a petition for certiorari." *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999). Respondents provide such notice.

III. THE ISSUE ON WHICH THE NFL SEEKS REVIEW IS NOT PROPERLY PRESENTED

The Petition also should be denied because the question the NFL contends is presented relates only to the players' LCPA claims. The NFL prevailed in state court on the LCPA claims on summary judgment, and the players have not appealed from that ruling. No matter how the Minnesota Court of Appeals disposes of the Williamses' appeal on the

DATWA claims, the LCPA ruling for the NFL will be undisturbed.

The NFL's Petition focuses heavily on the DATWA claims while saying very little about the LCPA claims. But the Eighth Circuit dutifully evaluated every "defense" proffered by the NFL with respect to the DATWA claims. *See* Pet. 18-29. It only invoked the "no defenses" statement with respect to the LCPA claims — and the NFL has prevailed on those claims in state court in a ruling that has not been appealed.

Moreover, the NFL grossly exaggerates the significance of the Eighth Circuit's statement about the role of defenses in § 301 analysis. In rendering its LCPA analysis, the Eighth Circuit authored a single footnote, upon which the NFL essentially premises its entire challenge to the Eighth Circuit opinion, that "the NFL's defenses to liability under the LCPA are not relevant to our section 301 analysis." But it is evident from the 8th Circuit's analysis of both the LCPA and DATWA claims that the Court *did* look to all of the NFL's defenses on both claims.

The NFL asserted three arguments in support of its argument before the Eighth Circuit that DATWA was preempted by § 301 of the LMRA. Each of the arguments was considered and rejected by the Eighth Circuit.

The first argument was predicated on the language of DATWA itself which allows employers to test employees covered by a CBA for drugs only if that testing "meets or exceeds" DATWA's protections. The NFL claimed that that language required an analysis of the CBA in order to evaluate the testing performed on the Williamses and thus

preempted the claim. The Eighth Circuit rejected that claim: "DATWA does not state that an employee who is a party to such a CBA cannot bring a claim under DATWA. Rather, where there is a CBA that is at least as protective of employees as DATWA, the number of possible claims an employee has against his or her employer will be affected." Pet. App. 19a. The Eighth Circuit explained that a court does not need to consult the CBA or NFL's drug policy in order to resolve the Williamses' DATWA claim. *Id.* A court only needs to compare the procedure that the NFL actually followed with respect to the particular employee with DATWA's requirements in order to determine if an employee should prevail. *Id.* Such a claim, the Eighth Circuit found, was not preempted. *Id.*

The NFL's second argument for preemption was that DATWA provides a cause of action only against "employers," and an interpretation of the CBA was required to determine whether the NFL qualified as an employer. The Eighth Circuit rejected that argument, explaining that "[t]he NFL does not point to a specific provision of either the CBA or the Policy which must be interpreted." Only the relationship between the NFL and the Williamses needs to be analyzed to determine whether an employer-employee relationship existed. Pet. App. 22a.[3]

The NFL's third preemption argument was also considered and rejected. The NFL argued that

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[3] The state trial court did precisely what the Eighth Circuit suggested and found that an employee-employer relationship existed without reference to the CBA, by examining the NFL's role in the Williamses' employment.

denying preemption and subjecting its drug policy to divergent state regulation would render the uniform enforcement of its drug testing policy nearly impossible and compromise the integrity of its business. Pet. App. 23a. The Eighth Circuit rejected this argument, relying on this Court's holding in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 212 (1985) that in adopting § 301 Congress did not give "the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation." Pet. App. 24a. National companies operate in multiple states and have no difficulty complying with the laws of each state in which they do business. And to suggest that the Minnesota Vikings players would have a competitive advantage over another team's because their drug tests are analyzed quicker or in a more reliable fashion is simply fiction.

The Eighth Circuit also considered the NFL's defenses on the LCPA claims. As to those claims, the NFL's first argument was based on the alleged need to interpret the CBA to determine whether the NFL's ban on Bumetanide, the substance for which the Williamses tested positive, was a *bona fide* occupational requirement – an exception to liability under the LCPA. Pet. App. 25a. The second argument was premised on a limitation in the LCPA which applied its restrictions only to the use of substances "off the premises of the employer" and "during nonworking hours." *Id.* The NFL claimed that these provisions in the LCPA required a court to analyze the terms of the CBA to determine whether the CBA was applicable to the Williamses' claim under the LCPA. The Eighth Circuit noted that the NFL was unable to direct the court to any specific

provision of the CBA that had to be construed in order to determine what a *"bona fide"* occupational condition constituted or "off the premises of the employer" and "during working hours" meant. Pet. App. 28a. The Eighth Circuit went so far as to review the entire 361-page CBA "provision-by-provision" and found no guidance that could resolve what *"bona fide"* occupational condition or what "working hours" meant, and thus found that the CBA did not need to be interpreted to resolve the Williamses' LCPA claims.

The Eighth Circuit specifically considered what the NFL now contends that the Court ignored: the Court reviewed the claims, considered the NFL's contention that the CBA was intertwined with the claims and needed to be interpreted in order to resolve the action, and expressly rejected the NFL's contentions.

IV. THERE IS NO CONFLICT IN THE COURTS OF APPEALS WARRANTING THIS COURT'S REVIEW

In this matter, the Eighth Circuit followed well-established case law allowing union and non-union employees to enjoy the statutory protections traditionally provided by states. *See Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994) ("§ 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law"); *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1076 (9th Cir. 2005) (a CBA could not waive non-negotiable rights regarding employee meal times provided in a state statute and "Section 301 must not be construed to give employers and unions the power to displace state regulatory laws"); *Graham v. Contract Transp., Inc.*, 220 F.3d 910, 914 (8th Cir.

2000) ("It would be inconsistent with congressional intent under § 301 to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract") (citing *Allis-Chalmers*, 471 U.S. at 212).

The NFL contends that the courts of appeals are divided, but that is simply not so. The only two federal appellate decisions involving § 301 and state drug testing laws are the decision below and the Tenth Circuit's decision in *Karnes v. Boeing Co.*, 335 F.3d 1189 (10th Cir. 2003), both of which hold that § 301 does not preempt such statutes. Notably, the NFL's Petition singles out the Tenth Circuit as being in "conflict" with the Eighth Circuit (*see* Pet. at 9), but *Karnes* belies that assertion. Indeed, the Tenth Circuit case the NFL cites — *Fry v. Airline Pilots Ass'n*, 88 F.3d 831 (10th Cir. 1996) — does not even involve § 301. It involves the Railway Act. *See Fry*, 88 F.3d at 833. And the NFL's Petition does not cite or discuss *Karnes*. Similarly, the Seventh Circuit case cited by the NFL, *Smith v. Colgate-Palmolive*, 943 F.2d 764 (7th Cir. 1991), has nothing to do with state drug testing laws.

The NFL's other claims in support of the circuit conflict are equally strained. The NFL cherry picks stray language from the Ninth Circuit's decision in *Sprewell v. Golden State Warriors*, 266 F.3d 979 (9th Cir. 2001), that § 301 preemption "is not mandated simply because the defendant refers to the CBA in mounting a defense." *Id.* at 922. The Ninth Circuit in that case was addressing the NBA's claim that NBA players had waived certain state law rights by entering into a CBA with the league, a defense the Ninth Circuit stated could be sustained only if the "CBA includes clear and unmistakable language

waiving the . . . employees' state right." *Id.* Any fair reading of the Ninth Circuit opinion demonstrates that the court then in fact evaluated the CBA in the course of concluding that no such waiver existed. *See id.* ("The NBA and the Warriors have failed to cite *any* language, let alone clear and unmistakable language, in the CBA waiving Sprewell's state law right to assert intentional interference claims against the NBA and the Warriors") (quotation omitted). *Sprewell* does not stake out a position on the issue the NFL claims warrants this Court's review. There is no relevant conflict of law or controversy to warrant granting the Petition.

V. THE NFL CANNOT CONTRACT FOR WHAT IS ILLEGAL UNDER STATE LAW.

States, and in this case the State of Minnesota, have an inherent interest in their citizens' privacy rights and in protecting their citizens' health, safety and procedural rights. *Farmer v. United Bhd. of Carpenters and Joiners of Am., Local 25*, 430 U.S. 290, 303 (1977). DATWA regulates minimum rights concerning the health, well-being, and due process of Minnesota employees with regard to employer drug testing. The NFL challenges Minnesota's right to legislate these basic employee rights, seeking to place itself above Minnesota law and circumvent the basic minimum requirements imposed upon employers in the State. Yet, this Court has been unequivocal, "§ 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." *Allis-Chalmers*, 471 U.S. at 212.

There is a strong presumption against preempting a state's legislation in the areas of the health and safety of its citizens. *Wyeth v. Levine*, No.

06-1249, 555 U.S. ___, 129 S. Ct. 1187 (Mar. 4, 2009); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *Lodge 76, Int'l Assoc. of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 137 (1976) (internal citations and quotations omitted) ("[i]n short, a State may still exercise historic powers over such traditionally local matters as public safety and order ... for policing of such conduct is left wholly to the states").

In *Farmer*, the Court considered a claim for intentional infliction of emotional distress brought by a union employee who voiced dissent regarding a union's operation. *Farmer*, 430 U.S. at 303. As a result of the employee's dissent, the union began to abuse and harass the employee by assigning him only to jobs of short duration or jobs for which he was not qualified. The union argued that federal labor law preempted the employee's intentional infliction of emotional distress claim.

The Court explained in *Farmer* that "inflexible application of the [preemption] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Id.* at 302. The Court determined that *Farmer* presented a case with "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.* at 296-97. The Court noted that

states have a paramount interest in "protecting the health and well-being of its citizens." *Id.* at 303. Accordingly, "in light of the discrete concerns of the federal scheme and the state tort law, that potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens." *Id.* at 304.

In *Metro. Life,* the Massachusetts Attorney General brought suit against an insurer to enforce a state statute which required that specified minimum mental health benefits be provided to Massachusetts residents. *Metro. Life,* 471 U.S. at 727. The insurer argued, in part, that the National Labor Relations Act preempted the state statute and deprived the state of the ability to legislate in the area of health benefits for employees. This Court soundly rejected the argument and held that the Massachusetts statute was a valid exercise of a state's historic police powers to protect the health and safety of its citizens by mandating minimum protections for employees. *Id.* at 756.

In two recent pronouncements, protecting states' regulations from preemption by federal schemes, this Court reaffirmed the presumption against preemption. *Cuomo v. Clearing House Assoc., L.L.C.*, 557 U.S. ___, 129 S. Ct. 2710 (2009); *Wyeth*, 129 S. Ct. at 1195. The *Wyeth* Court recognized the importance of not treating the issue of preemption lightly. *Wyeth*, 129 S. Ct. at 1195 n.3 ("We rely on the presumption [against preemption] because respect for the States as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly pre-empt state-law causes of action") (internal quotations omitted).

Courts within the Eighth Circuit, most recently in this matter, have properly applied the *Farmer* limitation on preemption. *See, e.g., St. John v. Int'l Ass'n of Machinists and Aerospace Workers*, 139 F.3d 1214, 1219 (8th Cir. 1998) (preemption doctrine must yield in § 301 case in order to protect state's interest in addressing intentional infliction of emotional distress); *Ferrell v. Cross*, 557 N.W.2d 560, 566-567 (Minn. 1997) (intentional infliction of emotional distress claim and defamation claim can proceed).

Any argument that the NFLPA waived – or could have waived – the Williamses' rights by entering into the CBA fails as a matter of law. Private parties cannot contract away an employee's non-discretionary state law rights. The Supreme Court has held that as a general matter a union is authorized prospectively to waive only statutory rights related to collective activity, such as the right to strike, and cannot waive an employee's individual rights provided by statute. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974); *Neppl v. Signature Flight Support Corp.*, 234 F.Supp.2d 1016, 1020 (D.Minn. 2002) (noting that union representatives cannot waive an individual employees' statutory rights) (applying *Gardner-Denver*).

There can be no real debate that Minnesota has a *bona fide* interest in maintaining and enforcing minimum rights and protections for its employees from encroachments by employers on their privacy, due process, health and safety rights. Drug testing can be acutely intrusive and falsely labeling someone a drug user based on inaccurate or ill-confirmed tests can result in major and life-long harm to an individual. Minnesota exercised its inherent right to

protect its citizens and regulate inappropriate discharge or suspension of employees within the State based on infringing drug testing.

VI. CONGRESS DID NOT PREEMPT OR CREATE LAWS THAT CONFLICT WITH THE STATES' RIGHT TO REGULATE DRUG TESTING.

"The purpose of Congress is the ultimate touchstone" in a preemption analysis. *Metro. Life*, 471 U.S. at 736, quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). That which is not specifically reserved for the federal government remains in the state's province. It is a fundamental principle of federalism that superseding state law and states' rights should not be done lightly. *Metro. Life*, 471 U.S. at 736.

Congress has historically been clear when it wants to preempt an area, including areas impacting sports organizations. For example, Congress explicitly created exceptions for sports organizations in the anti-trust arena. *Fed. Baseball Club v. Nat'l League*, 259 U.S. 200 (1922).

In the field of drug testing, Congress has legislated with regard to motor carriers, commercial transportation operators and railway operators. Federal Motor Carrier Safety Act, 49 C.F.R. Part 40, 382 (2000); Federal Railroad Administration, 49 C.F.R. Part 219 (2001); Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 (1988). One year after Minnesota enacted DATWA, Congress enacted the Drug-Free Workplace Act of 1988, 41 U.S.C. § 701, requiring recipients of federal grants to maintain a drug-free workplace. Official regulatory guidance from the federal government states that the Drug-Free Workplace Act of 1988 is designed to "coexist

with State and local law." Government-wide Implementation of the Drug-Free Workplace Act of 1988, 55 Fed. Reg. 21,687 (1990). Thus, the federal government enacted legislation relating to drug testing that was designed to supplement, not supplant, State law.

Despite numerous congressional hearings on the use of steroids in professional sports, Congress has chosen not to regulate the field of sports drug testing.[4] As such, the area remains within the purview of the States for regulation. The NFL seeks to have this Court do what it could not successfully accomplish by lobbying the Legislative branch of government, exempt it from state drug testing laws.[5] Preemption should not be used to attain this goal. *Meyer v. Schnucks Markets, Inc.*, 163 F.3d 1048, 1051 (8th Cir. 1998)

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[4] Acknowledging that federal law does not preempt the right of states to regulate drug testing, United States Senator Byron Dorgan, on September 28, 2010, at the urging of the NFL, introduced federal legislation specifically designed to preempt the field of sports drug testing. The potential for congressional action in this area undercuts the need for this Court's review.

[5] On April 7, 2005, the Minnesota House Commerce and Financial Institutions Committee met to discuss the enactment of an amendment to DATWA that resulted in permitting random drug testing of professional athletes. When the floor opened up to Representative Goodwin, she specifically noted that the amendment would not affect or undermine the minimum protections for employees set forth in DATWA. Hearing on HF 1103 Before the H. Commerce and Financial Institutions Comm., 2005 Leg., 84th Sess. (Minn. 2005) (statement of Rep. Barbara Goodwin, Member, House Commerce and Financial Institutions Comm.).

VII. THE CLAIMS IN THIS CASE ARE NOT PREEMPTED BECAUSE THE COLLECTIVE BARGAINING AGREEMENT NEED NOT BE EXAMINED TO DETERMINE THE CLAIMS.

Section 301 of the LMRA is a jurisdictional statute under which "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a). Section 301 was expanded to include a federal common law interpreting collective bargaining agreements. *Textile Workers Union v. Lincoln Mills*, 353 U.S 448, 451 (1957). This federal common law was deemed to preempt the use of state contract law to interpret collective bargaining agreements and enforcement. *Local 174, Teamsters of Am. V. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

Allis-Chalmers expanded the application of § 301 preemption beyond cases specifically alleging contract violations to those whose resolution "is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers*, 471 U.S. at 220. This Court reiterated that test for preemption in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987). Acknowledging that "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization," the *Caterpillar* Court explained that § 301 preempts only "claims founded directly on rights created by collective-bargaining

agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar*, 482 U.S. at 394 (1987)(*quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983)(internal quotation marks omitted). *Caterpillar* specifically rejected the contention that "all employment-related matters involving unionized employees be resolved through collective bargaining and thus be governed by a federal common law created by § 301." *Id.* at 396 n. 10 (internal quotation marks omitted), explaining that employee claims unrelated to the terms of a CBA were not preempted.

In clarifying when claims are preempted under § 301, the Court in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), held that states can provide substantive rights to workers irrespective of the existence of a CBA. *Id.* at 413. A state court suit seeking to vindicate these state law rights is preempted only if it "requires the interpretation of a collective-bargaining agreement." *Id.*

Lingle considered whether § 301 preempted an Illinois statute permitting an employee to file a claim for retaliatory discharge due to a collective bargaining provision which provided the employee with a contractual remedy for any termination without just cause. *Id.* The employee filed a claim with Illinois' Worker's Compensation Commission alleging a work related injury. *Id.* Thereafter, her employer terminated her for filing a false worker's compensation claim. *Id.* The employee went through the procedures outlined in the collective bargaining agreement and then sued, alleging that

her employer had violated the Illinois statute banning retaliatory terminations. *Id.*

The Court analyzed the elements of the Illinois statute and found that "[n]either of the elements requires a court to interpret any term of a collective-bargaining agreement." *Id.* at 407. "Thus, the 'state-law remedy in this case is 'independent' of the collective-bargaining agreement...for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.* Therefore, § 301 did not preempt the Illinois state claims.

In *Clark v. Kellogg Co.*, 205 F.3d 1079 (8th Cir. 2000), seasonal employees brought an action against their employer alleging breach of an oral contract to hire them permanently, promissory estoppel, fraudulent misrepresentation, and negligent misrepresentation. The employer claimed that § 301 preempted the breach of contract claim because the employer had an existing CBA with a union in which the employees were members.

Relying on *Lingle*, the Eighth Circuit in *Clark*, noted that "[w]hile Section 301 preempts claims founded directly on rights created by a CBA and claims substantially dependent on analysis of a CBA, not every dispute concerning employment or tangentially involving a provision of a CBA is preempted by Section 301." *Clark*, 205 F.3d at 1082. Because the *Clark* plaintiffs were not seeking to enforce any provision of the CBA, there was no preemption because the "state law claims neither originate in, nor refer in any substantial way to, the rights and duties established in the CBA." *Id.*

The Eighth Circuit has made a concerted effort to be "faithful to Supreme Court precedent" by

"requir[ing] that a claim be grounded on the rights established by a CBA, or substantially dependent on an analysis of a CBA, before it may be found to be preempted." *Graham*, 220 F.3d at 914 (no § 301 preemption where plaintiff claimed employer defamed him by terminating him as a result of a negative drug test and finding that the "defamation claim does not rely on any rights conferred by the CBA," but instead on "a right created by state law (namely, to be free from false and harmful statements made about him to others), which is a right that is independent of any CBA").

The Williamses' case needs no reference to or analysis of the CBA and is independent of it. The only relevant analysis involves an application of the NFL's actions to the confines of DATWA and a determination of whether those actions violated the Statute. The NFL's defense that it was merely complying with its CBA cannot insulate it from liability. Section 301 preemption is not applicable simply because a defendant without substance refers to the CBA in defending itself.

In *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238 (8th Cir. 1995), an employee brought an action to restrain his employer from suspending him pending an investigation into the employee's conduct. *Id.* at 1239. The employer argued that § 301 preempted the employee's claims because the collective bargaining agreement specifically authorized the employee's claims. *Id.* The Eighth Circuit reversed. *Id.* Relying on Supreme Court precedent, the Court explained that "a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law" and

"[t]he fact that defendant argues...that there was 'just cause' under the terms of the CBA for the discipline plaintiff received, does not create a basis for § 301 preemption." *Humphrey*, 58 F.3d at 1244 (quoting *Caterpillar Inc.*, 482 U.S. at 399); *see also*, *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 692 (9th Cir. 2001) ("The plaintiff's claim is the touchstone for this analysis; the need to interpret the CBA must inhere in the nature of the plaintiff's claim. If the claim is plainly based on state law, § 301 preemption is not mandated simply because the defendant refers to the CBA in mounting a defense"); *Umphrey v. Fina Oil & Chemical Co.*, 921 F.Supp. 434, 437 (E.D.Tex. 1996) ("although the employers may defend against claims by arguing that their actions were authorized under the CBA and its rules, this fact does not transform the claim into one which requires an interpretation of the CBA"); *Brown v. Holiday Stationstores, Inc.*, 723 F. Supp. 396, 403 (D. Minn. 1989) (employer's claim that its conduct is authorized by a CBA is insufficient to warrant preemption). In *Humprey*, the claim was not preempted since the Court's decision was based upon a review of the facts and the statute, and no review of the CBA was involved – as in the Williamses' case.

The decision in *Karnes* is also instructive. *Karnes*, 335 F.3d at 1189. In *Karnes*, Boeing terminated the plaintiff, pursuant to the terms of a collective bargaining agreement and the anti-drug policy incorporated in the CBA, after the plaintiff tested positive for marijuana. The plaintiff argued that the employer's conduct violated Oklahoma's Drug Testing Act, 40, § 562(A), prohibiting termination based on a positive test result unless a second confirmatory test were performed. As a threshold matter, the Tenth Circuit determined that

the plaintiff's claim was not preempted for § 301 purposes because "[i]n order to establish a violation of this section, [the employee] must show that Boeing (1) discharged him based on his drug test, and (2) failed to confirm the result through a second test. Neither inquiry requires a court to interpret, or even refer to, the terms of a CBA." *Id.* at 1193. "Thus, [Plaintiff's] Drug Testing Act claims are clearly independent of the CBA and are not subject to § 301 preemption." *Id.* at 1194. The Tenth Circuit further held that the mere fact that the discharge may have been consistent with the anti-drug policy contained in the CBA "is irrelevant because '§ 301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law.'" *Id.* at 1994 (citing *Allis-Chalmers*, 471 U.S. at 212); *see also Thompson v. Hibbing Taconite Holding Co.*, No. 08-868 (JRT/RLE) 2008 WL 4737442, *4-5 (D. Minn. Oct. 24, 2008) ("[w]hether the employer violated its own testing policies is a separate question from whether it satisfied the requirements set forth in DATWA..." and holding that the "[a]llegations that [the employer] violated such non-negotiable state law rights do[es] not require an interpretation of the CBA, and would *not be preempted* under the LMRA") (emphasis added).

Like in *Karnes*, because resolution of the Williamses' DATWA claims does not require an interpretation of the CBA, the NFL's preemption claim fails.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September 29, 2010

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Court File No. 27-CV-08-29778
Judge Gary Larson

STATE OF MINNESOTA
COUNTY OF HENNEPIN
DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Kevin Williams, Pat Williams,

Plaintiffs,

v.

National Football League,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

The above-entitled matter came on for a court trial before the Honorable Gary Larson, Judge of Hennepin County District Court, on March 8, 2010 through March 12,2010. Kevin Williams and Pat Williams appeared personally and through their attorneys, Peter Ginsberg, Esq., Steven Rau, Esq., and Christina Burgos, Esq. The National Football League appeared by its attorneys, Joseph Schmitt, Esq., Daniel Nash, Esq., and Marla Axelrod, Esq.

The parties agreed to dismiss John Lombardo, M.D., and Brian Finkle, M.D., as Defendants. At the commencement of trial, Adolpho Birch was also dismissed from the action. Based upon on the files, records, testimony, and proceedings herein, the Court makes the following findings:

FINDINGS OF FACT

1 That the National Football League ("NFL") is an unincorporated nonprofit association comprised of 32 member clubs, including the Minnesota Vikings ("Vikings").

2 That the National Football League Management Council ("NFLMC") is the exclusive multi-employer bargaining representative for the NFL member clubs, including the Vikings.

3 That each member club is separately owned. Upon purchasing an NFL team, each owner agrees to be bound by the NFL Constitution and Bylaws and other agreed upon internal rules.

4. That Kevin Williams ("Kevin") plays football for the Vikings and has been in the NFL for seven years.

5. That Kevin's contract with the Vikings contains a weight bonus clause.

6. That Kevin is a starting player for the Vikings and has been selected to play in the Pro Bowl five times.

7. That Kevin has never taken steroids, performance enhancing drugs, or attempted to mask any banned substance.

8. That in 2006, Kevin had surgery on his left knee for a torn patella. Kevin found that maintaining a lighter weight helped him feel better.

9. That, shortly after his operation, in the start of the 2007 season, Kevin took Star Caps.

10. That a team mate initially told Kevin about and gave him Star Caps. Kevin subsequently purchased Star Caps from GNC stores or over the internet.

11. That Kevin took Star Caps for the perceived health benefits, to meet his contractual weight requirements, and to avoid his coach's reprimands for not meeting the weight requirements prescribed in his contract.

12. That Kevin never saw any notice or warnings about Balanced Health Products or Star Caps. Kevin would not have taken Star Caps if he had known that they contained the banned substance Bumetanide.

13. That Pat Williams ("Pat") plays football for the Vikings and has been in the NFL for thirteen years.

14. That Pat's contract with the Vikings contains a weight bonus clause.

15. That Pat is a starting player for the Vikings and has been selected to play in the Pro Bowl a number of times.

16. That Pat has never taken steroids, performance enhancing drugs, or attempted to mask any banned substance.

17. That Pat suffers from high blood pressure and gout, and takes medications for these conditions.

18. That, due to these health conditions, doctors advised Pat to maintain a specified weight.

19. That Pat first took Star Caps while playing for the Buffalo Bills to help alleviate the retention of extra fluid in his joints.

20. That Pat first heard about Star Caps from another player on the Buffalo Bills. Pat spoke with his trainer about taking Star Caps, and the trainer told him that it would be okay. He purchased Star Caps from GNC stores or over the internet.

21. That Pat never received any notice or warnings about Balanced Health Products or Star Caps. No one ever

advised Pat not to take Star Caps. Pat would not have taken Star Caps if he had known that they contained the banned substance Bumetanide.

22. That Pat reviewed the contents of the Star Caps bottle, which states that it is an all natural supplement and did not list any prohibitive substance. He also tried calling the players' hotline, but never received an answer.

23. That Kevin and Pat are both members of the NFL Players Association ("NFLPA"), the exclusive bargaining representative for all NFL players. Kevin and Pat have been NFLPA members since they began playing in the NFL.

24. That in 2006, the NFLPA and the NFLMC negotiated and entered into a comprehensive collective bargaining agreement ("CBA") that governs the terms and conditions of players' employment with members clubs and establishes procedures for discipline and dispute resolution.

25. That the CBA states that players are employed by a member club of the NFL.

26. That member clubs have agreed to resolutions, which govern their relationships with each other. The clubs agreed to share revenue from certain sources, such as television contracts and national marketing agreements.

27. That the national contracts are negotiated by a committee of owners, who must be approved by the member clubs. Revenue from these deals is administered by the NFL, on behalf of the member clubs, and maintained in an agency account.

28. That the revenue sharing provides, among other things, that clubs with higher revenues will share with clubs with lower revenues.

29. That the Vikings have sole authority to hire, fire, negotiate, and sign contracts with players, cut players, and provide special bonuses for players.

30. That the NFL reviews and approves every NFL contract for Vikings players and team personnel.

31. That Kevin and Pat entered into NFL player contracts which set forth the terms of their employment. The NFL standard form contract is collectively bargained and is included as Appendix C to the CBA.

32. That the contracts for Kevin and Pat are on the standard NFL mandated forms and were approved by the NFL.

33. That players may only use agents who are approved by and registered with the NFL to negotiate their contracts.

34. That Kevin and Pat's contracts state that they are employed by the Vikings as a "skilled football player," accept such employment, and agree to give their best efforts and loyalty to the club.

35. That the Vikings Vice President of Football Operations, Rob Brzezinski ("Brzezinski") negotiated specific contract terms with Kevin and his agent, Tom Condon ("Condon").

36. That, as part of the employment contract, the Vikings agreed to pay Kevin a yearly salary for his performance, services, and other promises. The contract also provides for individually negotiated bonuses paid by the Vikings to Kevin, and the payment terms of these bonuses.

37. That these bonus provisions are not part of the standard NFL contract, and must be approved by the NFL and the NFLPA.

38. That Kevin's contract includes a weight provision, negotiated by Brzezinski, under which Kevin could earn up to $400,000 in 2008, if he met certain required weight goals. Under this provision, Kevin specifically agreed not to engage in any last minute weight-reducing tactics such as excessive use of a steam room, use of diuretics, fasting, et cetera.

39. That Brzezinski negotiated a standard NFL contract with Pat and his agent, Angelo Wright ("Wright"). As part of this employment contract, the Vikings agreed to pay Pat a yearly salary for his performance, services, and other promises.

40. That Pat's contract includes a weight provision, negotiated by Brzezinski, under which Pat could earn up to $400,000 in 2008, if he met certain required weight goals. Under this provision, Pat specifically agreed not to engage in any last minute weight-reducing tactics such as excessive use of a steam room, use of diuretics, fasting, et cetera.

41. That many of the rules and regulations governing the NFL and the teams are collectively bargained for, including, post-season pay, retirement plans, college draft rules.

42. That, pursuant to the CBA, Kevin and Pat are entitled to receive various retirement benefits, including pensions. The retirement plans under the CBA are established and administered pursuant to the Taft-Hartley Act.

43. That the CBA establishes the amount of a player's pension, which is administered through the auspice of a separate pension fund. The specific amount of

retirement benefits payable to Kevin and Pat are controlled by the plan.

44. That the Vikings financial obligations for such benefits are controlled by the CBA. The benefits are the financial responsibility of the Vikings, not the NFL. The Vikings are required to make contributions to the plan for the benefit of Kevin and Pat during their employment. The Vikings' contributions to the retirement plan are paid out of the Vikings' share of the agency account maintained by the NFL.

45. That Pat and Kevin are paid directly by the Vikings with funds that the Vikings receive from many sources, including league-wide revenue sharing, supplemental revenue sharing, fees which the NFL receives from media and endorsement contracts, and other sources.

46. That the NFL negotiates and enters into all media and endorsement contracts on behalf of the teams. Fees from these contracts are paid into the revenue sharing program.

47. That the NFL maintains and manages an agency account where the shared funds are deposited. The NFL then distributes these from the agency account to the teams pursuant to a formula created by the NFL.

48. That the Vikings sell merchandise through retail outlets, the internet, and other arenas. The Vikings keep part of these proceeds and then turn a certain portion over to the NFL into the revenue sharing account. A portion of ticket sales for all home games are also turned over to the NFL for revenue sharing.

49. That the NFL also manages a separate supplemental revenue sharing program, where money is collected from higher revenue generating teams and distributed

to lower revenue generating teams. Teams may not opt out of this process.

50. That the Vikings, like all teams in the NFL, are required to participate in a revenue sharing program. The NFL Commissioner imposes discipline if a team fails to pool funds appropriately.

51. That without revenue sharing, the Vikings could not pay all of its salaries and business expenses.

52. That the NFL is a tax exempt not-for-profit corporation. Accordingly, the NFL loans funds to teams at a lower rate than a for-profit entity could normally borrow funds. Some teams are able to borrow funds for as low as 1%.

53. That the NFL avoids the unrelated business tax due to its tax structure.

54. That the NFL controls many areas of operation for the Vikings through the NFL owner's manual which dictates rules governing who can own and operate NFL teams and where they can operate, the operation of teams, salaries, *salary* caps, television, public relations, playing rules, publicity, revenue sharing, and discipline.

55. That the NFL commissioner may discipline individual players for violations of NFL rules, including imposing suspensions and/or fines.

56. That the NFL must approve a company before a player may contract with it for endorsement purposes.

57. That players can only wear NFL approved clothing on game days.

58. That the NFL also maintains a credit facility from which teams may borrow money.

59. That the NFL enforces a debt ceiling for all teams of $150 million. The amount each team has borrowed is known only to the NFL.

60. That the NFL determines a player's performance-based pay by looking at the player's salary, draft status, and playing time.

61. That the NFL controls, in immense detail, what players may wear during games including sock and chin strap color, the type of tape that may be used on shoes, how jerseys are tucked in, and even how a player may use a towel

62. That under the NFL's conduct policy, Vikings players are subject to discipline by the Commissioner if they violate an NFL policy.

63. That the CBA specifically provides the amount that players receive for playing in the Pro Bowl. Kevin and Pat have been selected to the Pro Bowl several times. The Vikings pay its Pro Bowl players with money given to them by the NFL.

64. That the Vikings have qualified for the playoffs during Kevin and Pat's tenure with them. The CBA provides the terms of the players' post-season pay. The NFL gives the Vikings money to pay its players for post-season play.

65. That the CBA establishes a policy on Anabolic Steroids and Related Substances (the "Policy").

66. That the Policy is designed to eliminate the use of performance-enhancing drugs in the NFL. The Policy articulates three goals: (1) protecting the fairness and integrity of professional football; (2) protecting players' health and safety, and; (3) insuring that NFL players do not send the wrong message to young fans,

whom may be tempted to use performance-enhancing drugs.

67. That the Policy, although negotiated by the NFLPA and NFLMC, is administered by the NFL through an Independent Administrator and Consulting Toxicologist.

68. That Dr. John Lombardo ("Lombardo") is the appointed Independent Administrator and Dr. Bryan Finkle ("Finkle") is the Consulting Toxicologist.

69. That Adolpho Birch ("Birch") is the NFL's Vice President of Law and Labor Policy and is the person at the NFL with the responsibility over the Policy and the liaison with the NFLPA.

70. That Stacy Robinson ("Robinson") is the NFLPA Director of Player Development, and he is Birch's counterpart for the NFLPA with responsibility over the Policy.

71. That, at all times relevant to this lawsuit, Finkle served as the Policy's Consulting Toxicologist and was appointed jointly by the NFLPA and the NFLMC. Finkle also consults for the U.S. Anti-Doping Agency, the World Anti-Doping Agency, the National Olympic Committee, the British Olympic Committee, the National Basketball Association, and the National Hockey League.

72. That, although Lombardo serves as the Policy's "Independent Administrator," Lombardo reports to and takes directives from Birch.

73. That, although the Policy provides that Lombardo has sole discretion to certify a positive test, which includes determining whether to grant therapeutic use exemptions and verify the chain-of-custody, this is not, in fact, how the Policy works.

74. That Birch specifically directed Lombardo how and when to report certain, specific types of positive tests.

75. That the Policy provides that the NFL, and specifically Birch, bear responsibility for imposing discipline in accordance with the Policy. The Policy also provides that the testing costs and compensation for Lombardo and Finkle are paid by the NFL.

76. That Kevin and Pat received a copy of the Policy each year at training camp. Both Kevin and Pat read, understood, and were familiar with the policy and the list of substances prohibited by the Policy.

77. That the Policy forbids players from having prohibited substances in their bodies. The prohibited substances are listed in Appendix A to the Policy. The list is negotiated between the NFL and the NFLPA and includes steroids and potential blocking and masking agents, such as diuretics that hinder the detection of banned substances.

78. That Bumetanide is one of the banned substances on the prohibited list. Bumetanide was included in the Policy's prohibited substances list at all times relevant to this lawsuit.

79. That the Policy provides that the unknowing use of a prohibited substance is not a defense to such use.

80. That the Policy also states that the use of a dietary supplement that contains a prohibited substance is not a viable excuse or a defense to the use thereof.

81. That the NFL has sent several letters to the players warning them not to use any dietary supplements because they often contain prohibited substances that are not listed on the packaging.

82. That the NFL also sent alerts for specific brands of products that should not be used.

83. That the NFL never sent an alert about Star Caps.

84. That the Policy provides that whoever tests positive for a prohibited substance is subject to a first-time minimum four-game suspension without pay, to be administered by the NFL (i.e. Birch).

85. That the Policy provides a detailed procedure for collecting specimens, protecting the chain-of-custody, reviewing test results, and maintaining confidentiality.

86. That the NFL was not aware of and did not take into consideration the laws of the State of Minnesota, and specifically the Drug and Alcohol Testing in the Workplace Act ("DATWA"), which governs drug test collection for Minnesota employees.

87. That the Policy provides that a specimen collector must observe the player furnish a urine sample, and then split the sample into "A" and "B" bottles and forward the samples to the appropriate lab for testing.

88. That the NFL uses two laboratories to conduct player drug tests, the UCLA Olympic Analytical Laboratory ("UCLA Lab") and the Sports Medicine Research and Testing Laboratory in Utah ("Utah Lab").

89. That the UCLA Lab and the Utah Lab are certified and accredited by the World Anti-Doping Agency ("WADA") and the International Organization for Standardization ("IOS").

90. That the UCLA Lab does not conform to the specific requirements of DATWA, but in all respects meets or exceeds the requirements for testing by laboratories as set out in DATWA.

91. That the Policy states that Lombardo may choose which laboratories to use.

92. That Lombardo testified that the UCLA lab is overworked and cannot possibly conduct player drug tests within three days, as required by DATWA.

93. That the NFL has an ownership interest in the Utah Lab and has a financial arrangement with the UCLA lab.

94. That the Policy requires that all NFL players be subject to annual drug tests as part of their pre-season physical examination during training camp.

95. That Kevin and Pat's urine samples were collected at the start of training camp, on July 26, 2008, pursuant to the Policy's annual pre-season testing provision, as noted in the NFL manual.

96. That Kevin and Pat observed the collectors split their specimens into "A" and "B" bottles and signed the chain-of-custody forms.

97. That Kevin and Pat's samples were sent to the UCLA Lab, which received them on July 28, 2008.

98. That the UCLA Lab completed an initial screening test on Kevin's "A" bottle on August 1, 2008. The lab then performed a confirmatory test on Kevin's "A" bottle sample beginning on August 6, 2008, and completing it on August 12, 2008. The results of the confirmatory test were certified on August 12 or 13, 2008.

99. That on August 13, 2008, the lab notified Lombardo of Kevin's initial positive screening and positive confirmatory test results.

100. That Lombardo then reviewed the chain-of-custody forms and scheduled a testing date for Kevin's "B" bottle sample.

101. That on August 27, 2008, Lombardo sent Kevin written notification of his positive test result. The letter was sent in an envelope marked "confidential." The letter was addressed to the Vikings and placed in Kevin's open locker.

102. That Lombardo's letter advised Kevin that his "B" bottle test would occur on September 9, 2008, and that he was entitled to have a qualified toxicologist observe the "B" bottle test.

103. That after receiving Lombardo's letter, Kevin told his wife; his agent Condon, and his coach, Brad Childress, about his positive test results.

104. That Condon informed his colleague Tracy Lartigue ("Lartigue") about Kevin's positive sample.

105. That on September 2, 2008, Lartigue sent Birch a letter appealing Kevin's positive test result. Lartigue copied Robinson in his letter.

106. That Kevin arranged for Dennis Crouch ("Crouch"), an independent toxicologist, to observe his "B" bottle test. Both Crouch and Finkle observed the "B" bottle test on September 9, 2008.

107. That the confirmatory "B" bottle test was positive for the presence of Bumetanide.

108. That Finkle reviewed the "B" test. On September 17, 2008, Finkle notified Lombardo, via e-mail, of his certification of Kevin's positive test result.

109. That Lombardo notified Lartigue, by phone, on September 22, 2008, that Kevin's final test was positive for Bumetanide.

110. That on September 22, 2008, Lombardo notified Birch, by mail, of Kevin's positive test result. This

was the NFL's first notice of Kevin's positive test result.

111. That Lombardo's September 22, 2008 letter was received by the NFL on September 24, 2008.

112. That, on September 26, 2008, Birch sent a letter by express mail, on behalf of the NFL, to Kevin and the Vikings notifying them that Kevin would be suspended for four games because he tested positive for a banned substance.

113. That, with regard to Kevin's drug test, the NFL did not comply with DATWA'S three-day notice requirement.

114. That Kevin testified at trial that he was not harmed because of Lombardo's or the NFL's delay in informing him of his positive test result.

115. That Kevin acknowledged that Bumetanide was in his system and does not challenge that he tested positive for Bumetanide.

116. That the UCLA Lab completed the initial testing screening on Pat's "A" bottle sample on August 1, 2008. The lab performed a confirmatory test on Pat's "A" bottle sample on August 6, 2008, and completed the analysis on August 12, 2008.

117. That the lab certified Pat's result as positive for the presence of Bumetanide. On August 13, 2008, the lab notified Lombardo of Pat' s positive test result.

118. That Lombardo requested the chain-of-custody documents for Pat's test. Lombardo conducted an initial review of all documents, and scheduled a date to conduct testing on Pat's "B" bottle sample.

119. That, on August 27, 2008, Lombardo sent Pat written notification of his positive results. The letter was in

an envelope marked "confidential" and was sent to the Vikings and placed in Pat's open locker.

120. That Lombardo scheduled Pat's "B" bottle test for September 9, 2008.

121. That shortly after receiving Lombardo's letter, Pat told his wife; his agent Wright; and his coach, Brad Childress, about his positive test result.

122. That Pat chose not to have an independent toxicologist observe his "B" Sample test.

123. That Pat's "B" bottle sample was certified as positive on September 10, 2008. On September 11, 2008, Lombardo was notified that Pat's "B" bottle showed the presence of Bumetanide.

124. That Finkle reviewed the documents and certified them to Lombardo on September 23, 2008.

125. That Lombardo reviewed the documents and certified the positive results to Birch on September 29, 2008. This was the first notice that the NFL received of Pat's positive test results.

126. That Lombardo's note was received by the NFL on October 1, 2008.

127. That on October 3, 2008, Birch sent the letter to Pat and to the Vikings notifying them that Pat would be suspended for four games because he tested positive for a banned substance.

128. That, with regard to Pat's drug test, the NFL did not comply with DATWA's three-day notice requirement.

129. That Pat testified that he was not harmed by either Lombardo's or the NFL's delay in informing him of his positive test results.

130. That Pat acknowledged that Bumetanide was in his system. Pat does not challenge the results showing that he tested positive for Bumetanide.

131. That on October 24, 2008, journalist Josina Anderson reported that a "highly-placed NFL source" released information that several NFL players tested positive for Bumetanide.

132. That on October 24 or 25, 2008, Jay Glazer, a news reporter, reported that Kevin and Pat tested positive for Bumetanide.

133. That Commissioner Roger Goodell was apparently not interested in discovering the source of the leak and did not request an investigation, on behalf of the NFL, to determine if anyone at the NFL was responsible for the leak.

134. That Birch testified that, in his opinion, reference by reporters to the NFL or League includes the NFL Football League, the NFLPA, players, agents, coaches, trainers, and team doctors. Birch defines the NFL as including all of these groups and individuals.

135. That Birch conducted a very brief investigation on his own concerning the leak. Birch concluded that no one from the NFL was involved in the leak., contrary to the newspaper reporter's assertion.

136. That Birch's single-handed investigation is highly suspect.

137. That Birch reached a totally unsupportable and unfounded conclusion, alleging that a certain individual outside of the NFL was the actual source of the leak.

138. That it is impossible for the Court to conclude by a preponderance of the evidence that any particular

individual was the source of the leak regarding Plaintiffs' positive test results.

139. That the Court finds that Kevin and Pat's attorney was not the source of the leak.

140. That Birch's contradictory testimony in this regard is not credible.

141. That in 2005 and 2006, Lombardo and Finkle became aware that a cluster of players' urine samples were testing positive for Bumetanide.

142. That Bumetanide is a very potent and dangerous drug and can cause serious side effects, including death, if inadvertently taken and not under the supervisions of a physician.

143. That Finkle became concerned because he had neither seen this drug nor its level of potency in previous tests.

144. That Finkle and Lombardo discussed their concerns regarding Bumetanide. After interviewing players who had taken Star Caps and subsequently tested positive, it became clear to them that Star Caps was creating the positive test results.

145. That because of the clear correlation between Bumetanide and Star Caps, Finkle and Lombardo requested that the Utah Lab performed a study on Star Caps. The study confirmed that Star Caps contained Bumetanide.

146. That it was obvious to Finkle that if a player took Star Caps, he would test positive for Bumetanide.

147. That Lombardo advised Birch that Star Caps contained the "secret" banned substance.

148. That Birch indicated that he would inform the FDA or another appropriate agency of this finding.

149. That Birch made a conscious decision not to inform the FDA or any other regulatory agency that Star Caps contained Bumetanide.

150. That Birch now knew that Star Caps contained Bumetanide and that NFL players were inadvertently ingesting Bumetanide.

151. That Birch made an affirmative decision to not disclose to the teams, the NFLPA, or the players, that Star Caps contained the banned substance Bumetanide and should not be used.

152. That prior to 2007, a number of players tested positive for Bumetanide and were not referred for discipline.

153. That Birch knew full well that players would continue taking Star Caps and testing positive for Bumetanide.

154. That Birch, thereafter, directed Lombardo to report any future players for discipline who tested positive for Bumetanide, even though their use thereof was inadvertent. Birch was playing a game of "gotcha."

155. That the NFL recently filed pleadings in *American Needle v. Nat'l Football League*, No. 08-661, 2009 WL 3865438 (2009), and argued before the United States Supreme Court that, contrary to its assertion in this case, the NFL should be treated as a single entity with the various member teams for anti-trust purposes.

156. That on December 3, 2008, Kevin and Pat filed suit against the NFL; the Policy's Independent Administrator, Lombardo; the Consulting Toxicologist, Finkle; and the NFL's Vice President of Law and Labor Policy, Birch. The complaint alleged a variety of common law torts based on Defendants' purported breach of their fiduciary duty to warn

players that Star Caps contained Bumetanide. Defendants removed the action to federal court on December 4, 2008.

157. That after this suit was removed to federal court, the suit was consolidated with a matter captioned *Nat'l Football League Players Ass'n v. Nat'l Football League and Nat'l Football League Management Council*, No. 08-CV -6254, 2009 WL 1457007 (D. Minn. May 22, 2009) (the "NFLPA Suit").

158. That the NFLPA Suit alleged claims on behalf of five NFL players, including Kevin and Pat, and sought to overturn the suspensions of those players on the grounds that their suspensions were the product of arbitrator bias, a public policy violation, and were inconsistent with the CBA. In support of the public policy claim, the NFLPA argued that the NFL failed to warn the players that Star Caps contained Bumetanide, in violation of state law fiduciary obligations. In support of its claim that the awards were inconsistent with the CBA, the NFLPA argued that the NFL had imposed harsher discipline on players who tested positive for diuretics in 2008 than it had imposed on players who tested positive for diuretics in 2006.

159. That Kevin and Pat filed a first amended complaint in federal court on January 2, 2009, which added counts under DATWA, Minn. Stat. § 181.950 *et seq.*, and the Lawful Consumable Products Act ("LCPA"), Minn. Stat. § 181.938.

160. That, on April 14, 2009, the parties in this case stipulated to dismiss Finkle as a party. On March 8, 2010, Plaintiffs dismissed, with prejudice, individual Defendants Birch and Lombardo.

161. That between January and April 2009, the parties engaged in expedited discovery followed by an accelerated summary judgment briefing schedule.

162. That following discovery, Defendants, Plaintiffs; and the NFLPA filed cross-motions for summary judgment in federal court.

163. That on May 22, 2009, the federal court denied Kevin and Pat's Motion for Summary Judgment and granted Defendants' summary judgment motion in part, holding that Plaintiffs' common law claims were preempted by section 301 of the Labor and Management Relations Act. *Nat'l Football League Players Ass'n v. Nat'l Football League*, 654. F. Supp. 2d 960, 967 (D. Minn. 2009). The Court held, however, that Plaintiffs' claims under DATWA and the LCPA were not preempted, and remanded those claims to this Court.

164. That the United States District Court rejected all of the common law claims asserted by Kevin and Pat, holding that those claims were preempted by Section 301 of the Labor Management Relations Act. *Nat'l Football League Players Ass'n*, 654 F. Supp. 2d at 967.

165. That the Court granted in full Defendants' Motion for Summary Judgment filed in the NFLPA Suit.

166. That in addressing the NFLPA's claims under Section 301 of the LMRA on their merits, the Court first reviewed the NFLPA's claim that the arbitration award upholding Plaintiffs' suspensions did not "draw its essence from the CBA." The Court rejected the NFLPA's claim that the suspensions were inconsistent with the CBA because several players in 2006 and 2007 had not been suspended for a positive

diuretic test. *Nat'l Football League Players Ass'n*, 654 F. Supp. 2d at 968.

167. That the Court addressed and dismissed the NFLPA's claim that the award violated public policy because it condoned a "breach of fiduciary duty." The Court rejected the argument about Lombardo's alleged failure to warn, concluding that "Lombardo's decision not to publish specific warnings about Star Caps does not violate his duties to players. Lombardo testified that he decided to send a general warning about weight-loss supplements rather than about Star Caps in particular because 'the problem is the whole area of weigh[t] reduction products.'" *Nat'l Football League Players Ass'n*, 654 F. Supp. 2d at 970. The Court therefore concluded that "Lombardo exercised his discretion under the Policy to educate players, and did so in a general way because he believed that all weigh[t]-reduction products, not just Star Caps, carried risks." *Id.* The Court, therefore, all claims related to Plaintiffs' failure to warn claim.

168. That the parties filed cross-appeals with the United States Court of Appeals for the Eighth Circuit, which affirmed the district court's decision in its entirety. *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009). The Eighth Circuit held that Plaintiffs' statutory claims were not preempted because it could not identify "a specific provision of either the CBA or the Policy which must be interpreted." *Id.* at 877.

169. That on June 5, 2009, Plaintiffs attempted to file a second amended complaint in this case identifying the bases for their statutory claims, adding a new "retaliation" claim, and specifically alleging breaches of the collectively-bargained Policy.

170. That this Court held that Plaintiffs were not permitted to file the second amended complaint without leave of

Court, pursuant to a filed motion. Plaintiffs never submitted a Motion for Leave to File the Second Amended Complaint.

171. That the Court's summary judgment decision left only two of Plaintiffs' claims for resolution: (1) Plaintiffs' claim under the three-day notice provision of DATWA; and (2) Plaintiffs' claim under DATWA's confidentiality requirements and the collectively-bargained Policy on Anabolic Steroids and Related Substances.

ORDER

1. That Defendant NFL is Plaintiffs Kevin Williams and Pat Williams's employer for purposes of DATWA.
2. That Defendant NFL violated DATWA's three-day notice requirement.
3. That Plaintiffs Kevin Williams and Pat Williams were not harmed by Defendant NFL's DATWA violation.
4. That Plaintiffs Kevin Williams and Pat Williams failed to prove by a preponderance of the evidence that Defendant NFL's violated DATWA's confidentiality provision.
5. That Plaintiffs Kevin Williams and Pat Williams's request for a permanent injunction is denied.
6. That this Court's previous temporary injunction is dissolved.
7. That the attached memorandum is incorporated herein.

Let judgment be entered accordingly.

BY THE COURT

Dated: May 6, 2010

s / Gary Larson
Gary Larson
Judge of District Court

JUDGMENT

I hereby certify that the judgment contained in this Order herein above constitutes the Judgment of the Court.

Dated:

Court Administrator

By: Deputy Clerk

MEMORANDUM

I. LEGAL ANALYSIS

A. The NFL is Plaintiffs' Employer for Purposes of DATWA.

For purposes of DATWA, the NFL is Plaintiffs employer. DATWA governs only "'employer drug testing of employees." *Kise v. Product Design & Eng'g*, 453 N.W.2d 561, 563 (Minn. Ct. App. 1990). DATWA defines an employer as "a person or entity located or doing business in this state and having one or more employees, and includes the state and all political or other governmental subdivisions of the state." Minn. Stat. § 181.950, subd. 7. An employee is "a person, independent contractor, or person working for an independent contractor who performs services far compensation, in whatever form, from an employer." *Id.* subd. 6. Plaintiffs are indisputably employees of the NFL as well as the Vikings, for DATWA purposes.

The evidence adduced at trial shows that the NFL, along with the Minnesota Vikings, is a joint employer of Plaintiffs. The doctrine of joint employer status recognizes that a worker may have more than one employer. *See Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66 (2d Cir. 2003) ("The regulations promulgated under the FLSA expressly recognize that a worker may be employed by more than one entity at the same time") (citing 29 C.F.R. § 791.2 (2003)); *Gargano v. Diocese of Rockville Ctr.*, 888 F.Supp. 1274, 1278 n.2 (E.D.N.Y. 1995) ("The concept of 'joint employer' most frequently arises in the context of claims asserted under the [NLRA], whether by individuals or the National Labor Relations Board"), *affd*, 402 80 F.3d 87 (2d Cir. 1996). Whether a person "'possesse[s] sufficient control over the work'" of employees to qualify as a joint employer "is essentially a factual issue." *International House v. NLRB*, 676 F.2d 906, 912 (2d Cir. 1982) quoting *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964)).

The NFL, not the Vikings, controls everything about the drug testing process for Minnesota employees including when the testing occurs, where it occurs, how often it occurs, who conduct the specimen collection, and which lab tests the sample. Moreover, the NFL's reach extends beyond drug testing to virtually every aspect of a player's employment, down to the uniforms the players are obligated to wear.

The NFL has significant control over the players' employment. *See Boire*, 376 U.S. 473 (determining joint employment under the National Labor Relations Act based on the "indicia of control" exercised by an employer); *Auto. Trade Ass'n of Maryland v. Harold Folk Enters., Inc.*, 484 A.2d 612 (1984) (finding joint employer status may be found where two or more businesses exercise some control over the work or working conditions of an employee). The Minnesota Supreme Court articulated a five-part test to determine whether an employment relationship exists: (1 the right to control the means and manner of performance; (2) the mode of payment: (3) the furnishing of material or tools; (4) he control of the premises where the work is done; and (5) the right of the employer to discharge. *Guhlke v. Roberts Truck Lines*, 128 N.W.2d 324 (Minn. 1964). The NFL is an employer under each part of this test.

1. The NFL Controls Plaintiffs' Means and Manner of Performance and the Location of Team Play.

The NFL directly and indirectly controls many aspects of a player's life both on and off the field. This control emanates from a series of formal rules and regulations existing both separate from and in conjunction with the CBA.

In *Boire v. Greyhound Corp.*, the Supreme Court indicated that a determination of joint employment, under the National Labor Relations Act, is based on the "indicia of control" exercised by an employer. 376 V.S. 473 (1964). There, the Court found that maintenance workers hired by an

independent contractor to clean a bus terminal were jointly employed by Greyhound, the bus company which owned the terminal. *Id.* The Supreme Court remanded the case for a factual evaluation of the control Greyhound exercised over the work of the maintenance employees. *Id.*

Subsequently, the Fifth Circuit Court of Appeals found that Greyhound was an employer of the maintenance workers because it exerted control over many aspects of the workers' employment. *N.L.R.B. v. Greyhound Corp.*, 368 F.2d 778 (5th Cir. 1966). The court looked to the following facts: (1) the employees constituted a homogeneous, readily identifiable and stable unit; (2) the service agreements gave Greyhound the right to establish work schedules, assign employees to perform work, specify the exact manner and means of accomplishing work, and to control regular and overtime wages; (3) employees used Greyhound's equipment and supplies in their work, and; (4) in the course of their duties, porters were given detailed supervision by other Greyhound personnel. *Id.* at 781.

Similarly, the NFL exerts control over many aspects of the players' employment. The NFL exerts some of its control over the means and manner of a player's performance by exercising control over the teams. The NFL directly regulates teams and team owners. For example, anyone buying into the NFL as a team owner must adhere to the rules and guidelines set forth in Policy Manual for Member Clubs, 2009 edition ("NFL Owner's Manual"). Any owner failing to abide by the NFL Owner's Manual faces punishment issued by the NFL. Like all prospective owners, the NFL required the Wilfs, the Vikings owners, to und ergo an extensive background check by the NFL before they were permitted to purchase the Vikings.

The NFL Owner's Manual also governs the manner in which the Vikings operate. It dictates rules governing team operations, salaries, mechanism of salary caps,

television contracts, public relations, playing rules, publicity, revenue sharing, and discipline. The NFL Commissioner has sole authority over such issues. The NFL maintains a strict hold over the contract process -refusing, for example, to approve contracts that do not use an NFL-mandated form or are not negotiated by registered agents. Before a player can sign on with a team, the NFL must review and approve his contract.

The NFL also controls where teams can operate. If the Vikings relocated, the Wilfs would be required to pay the NFL an excise tax. If an expansion team joined the NFL, it too would have to pay the NFL an excise tax. The NFL's control also extends to team playing schedules and locations. The NFL decides which teams will play against each other each week, when, where, and at what time the games will be played.

The NFL's level of control over the location, manner, and means of players' performance makes it appropriate to adjudicate it as an employer for DATWA purposes.

2. The NFL Controls the Mode of Payment to Plaintiffs.

The NFL argues that it should not be considered players' "employer" under DATWA because it does not issue a weekly paycheck to players. Nothing in DATWA requires such a restrictive reading. In fact, language defining "employee" suggests the contrary -DATWA specifically contemplates looking beyond the technicalities of how an employee is paid and instead focuses on "compensation, in whatever form." Minn. Stat. § 181.950(6).

The NFL negotiates for, collects, and apportions funds from which Plaintiffs and all other NFL players are paid. As stated earlier, the NFL's level of control over NFL teams is akin to that of a franchisor over a franchisee. The NFL is aware of the specific financial conditions of teams

requiring credit while individual teams do not know about other teams' finances. NFL teams must operate within the confines of rules and regulations imposed by the NFL. The NFL even identified the League as a franchise, and the teams as franchisees, in its 2000 IRS filing.

An additional sign of the degree of the NFL's control over teams is the NFL's avoidance of the unrelated business tax. Companies, such as Target and McDonalds, would be required to pay the unrelated business tax if one were to borrow from the other. Here, member teams are neither independent entities nor "unrelated" to the NFL in a corporate sense. Hence, member teams avoid the unrelated business tax when revenue filters to them from NFL bond transactions.

At the heart of the NFL's control is commercial control. The NFL even determines the companies with whom players can contract for endorsements. None of these enumerated control points, or others proved at trial, are dictated or addressed in the CBA. With a few exceptions involving pre-season play, the NFL negotiates and enters into all media contracts on behalf of the teams. The NFL has contracts with CBS, ESPN, Fox, and others. The NFL controls national sponsorships with companies such as Coca-Cola and Verizon. The NFL runs the NFL Network, the NFL website, NFL Film, and historical programming without any input from the teams or players. The NFL is the conduit from which revenue from those deals is distributed in order to fund teams and pay players.

The NFL also controls team finances as part of Revenue Sharing and Supplemental Revenue Sharing programs. All teams receive revenue sharing from the NFL. The revenue sharing comes from fees received by the NFL far, *inter alia*, media and endorsement contracts. The NFL maintains and manages an agency account where shared funds are deposited. The NFL then distributes these funds

from the agency account to teams pursuant to a formula created by the NFL. The teams are removed from the process and revenue pooling occurs automatically. To solidify the NFL's control over the process, the NFL Commissioner exercises discipline if a team fails to pool funds appropriately. Moreover, teams are not permitted to opt out of this process.

While NFL teams technically remit checks to players as compensation, some of these funds come from the NFL League Office. Part of players' salaries are paid for with funds from the NFL through the revenue sharing program. Player benefit plans, including pensions, tuition reimbursement, severance pay, and termination pay, are funded by NFL contracts and the NFL revenue stream. With regard to Plaintiffs, revenue sharing is particularly important. The Vikings could not pay its players' salaries and business expenses without the additional income it receives from revenue sharing.

The NFL controls the mode of payment to Plaintiffs because it controls and supplies many of the funds to the teams that the teams then pay Plaintiffs for the performance and services. The NFL meets the payment control prong of the *Guhlke* test.

3. The NFL Controls the Materials and Tools Used by Plaintiffs.

The NFL controls many of the materials and tools used by Plaintiffs in the course of their employment. The NFL acts as a franchisor of NFL teams controlling the rules that players must follow in order to play professional football. The NFL controls just about every aspect of Plaintiffs' workplace performance including what they wear, how they are permitted to act, and what football and non-football rules they must follow.

Moreover, the NFL furnishes and regulates the tools and materials with which players perform on the field. The NFL dictates step-by-step exactly what an NFL uniform must look like to pass as suitable attire. The NFL controls even minute details, such as the color of a player's chinstrap. The NFL's power over players' tools and materials may even override medical advice and/or treatment. For example, the NFL League Office has final approval, even if contrary to medical advice, on whether a player will he permitted to use tinted eye shields during a game. If a player chooses not to follow the rules imposed by the NFL, he faces fines or possible discharge. The NFL also meets the material and tools control prong of the *Guhlke* test for determining the identity of a worker's employer.

4. The NFL Controls the Right to Discipline and Discharge Plaintiffs.

The NFL's power to control is most evident in its ability to discipline and discharge players. The NFL's conduct policy applies to all NFL players and club employees. The NFL Commissioner is empowered to impose fines and subject NFL players and personnel, including coaches, referees and owners to non-monetary discipline as well. The NFL determines game-related misconduct including on-field infractions. NFL employee Merton Hanks enforces the uniform policy and the NFL collects fines for violations. The NFL also polices and punishes player conduct off of the field.[1] The NFL also

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[1] For example, Commissioner Goodell recently suspended Pittsburg Steelers Ben Roethlisberger for six games for violating the league's personal conduct policy, even though he was not charged with any crime. It is interesting to , note that a highly respected newspaper characterizes Roethlisberger's position as "an employee of the NFL." William C. Rhoden, Commissioner sends a message to rookie class, GLOBAL EDITION OF THE N.Y. TIMES, April 24-25, 2010, at Sports 13.

maintains the right to discharge players. For example, the NFL discharged Vikings player Bryan McKinnie from the 2009-2010 Pro Bowl Team. The NFL withheld McKinnie's Pro Bowl pay and required him to re-pay his Pro Bowl related expenses.

Finally, the NFL has the sole right to discipline players under the steroid Program. Although the Independent Administrator, in theory, has discretion whether to refer a player for discipline, Birch usurped Lombardo's authority in deciding who to refer for discipline. The NFL has ultimate authority to impose discipline under the program. Neither the Vikings nor any other team, is empowered to issue, prevent, or alter any discipline under the Program.

The NFL meets almost all of the criteria under *Guhlke*. The NFL has the right to contra I the means and manner of performance, the mode of payment, the furnishing of material or tools; exerts some control of the premises where the work is done, and has the right to discharge and discipline players. *Id.* Based on the *Guhlke* test established by the Minnesota Supreme Court, the NFL is a joint employer of Plaintiffs for DATWA purposes.

B. DATWA Applies to the NFL's Drug Testing in this Case.

DATWA applies to employers who conduct drug or alcohol testing. Minn. Stat. § 181.951. As established above, drug or alcohol testing is defined as an "analysis of a body component sample ... for the purpose of measuring the presence or absence of drugs, alcohol, or their metabolites in the sample tested." Minn. Stat. § 181.950(5). DATWA defines "drug" as a controlled substance as defined by Minn. Stat. § 152.01(4). Minnesota's controlled substance statute specifically includes "anabolic steroids," a substance for which the NFL tested players.

Minn. Stat. § 152.01 (4)(6). Minnesota law also states that a controlled substance includes drugs, which are defined as "as medicines and preparations recognized in the United State Pharmacopoeia or National Formulary and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either humans or other animals." Minn. Stat. § 152.01, subd. 2. Bumetanide is included in this definition. Drug testing for Bumetanide falls under the auspices of DATWA and applies to the NFL in this case.

DATWA covers the substances under the NFL's drug testing Policy. DATWA applies to the NFL and the drug testing at issue in this case.

C. Defendants Did Not Comply With DATWA's Three-Day Notice Requirement for Test Results.

Minnesota Statute § 181.953 subdivisions 3 and 7 provide that the "laboratory shall disclose to the employer a written test result report ... within three working days after a confirmatory test" and that the employer "[w]ithin three working days after receipt of a test result report from the testing laboratory ... shall inform in writing an employee ... of a positive test result on a confirmatory test." The lab did not disclose the confirmatory "B" sample test results to the NFL within three days and that the NFL did not disclose the results to Plaintiffs three days later.

Kevin and Pat were initially tested on July 26, 2008, but did not receive notice of the positive test results until September 26, 2008 and October 3, 2008, respectively. Dr. Lombardo stated that players generally receive notice of the initial test "anywhere from 14 days to 30 days, 35 days, sometimes longer," but that there is no time period by which he must inform players of a positive test result.

Lombardo reports to the NFL, is paid by the NFL, and takes direction from the NFL. Lombardo is an agent of

the NFL and received Plaintiffs' test results, in his capacity as an agent of the NFL. Lombardo received both Kevin and Pat's "*A*" sample test results on August] 3, 2008. Plaintiffs did not receive confirmation of their test results until late September and early October. Regardless of whether the NFL desired to give Plaintiffs' test results an additional level of review, they violated DATWA by not disclosing the confirmatory test results to Plaintiffs within three working days. This lapse in time violates DATWA's three-day notice requirement. The NFL's practice does not meet or exceed DATWA's three-day notice requirement.

Although, Defendants failed to comply with DATWA's three-day notification requirement, Plaintiffs testified that they did not suffer any harm as a result of the delay. When asked how he was harmed by any delay in notification, Kevin responded, "'I don't know, I wasn't." Similarly, Pat answered, "I guess I wasn't harmed." Because Plaintiffs did not suffer any damages as a result of the delay in notification, they are not entitled to relief under DATWA.

D. Plaintiffs Failed to Prove that the NFL Breached DATWA's Confidentiality Requirement.

Plaintiffs claim that the NFL breached the confidentiality requirement of DATWA. DATWA's confidentiality requirement states that "test result reports and other information acquired in the drug or alcohol testing process are ... private and confidential information, and ... may not be disclosed by an employer or laboratory to another employer or to a third-party individual, governmental agency, or private organization without the written consent of the employee or job applicant tested." Minn. Stat. § 181.954(2). Plaintiffs did not prove by a preponderance of the evidence that the NFL disclosed Plaintiffs' test results inappropriately.

Plaintiffs' stated, at trial, that they shared the results of their positive drug tests with others. Kevin told his wife, Vikings' Coach Brad Childress, his agent Candon, and his attorney. Coach Childress testified that he told Vikings Vice President of Football Operations Brzezinski. Condon told Lartigue, another agent in Condon's office. Kevin also told David Black and Dennis Crouch, two independent toxicologists. Kevin also stated that he may have told additional people, but "can't remember everybody on the list." Pat told his wife, his agent Wright, Kevin, and Coach Childress. Plaintiffs' coach, agents, and attorney, as well as Brzezinski all testified that they were not the source of the leak. Lartigue and Plaintiffs' wives did not testify. Because so many people outside of the NFL were informed of Plaintiffs' test results prior to the media reports, it is impossible for the Court to conclude by a preponderance of the evidence that the NFL must have violated DATWA's confidentiality provision.

The Court does conclude, however, that the media leak was clearly of no importance to the NFL Commissioner, as he did nothing to determine that the NFL did not violate DATWA's confidentiality provision. The Commissioner did not conduct an investigation or make any inquiries into the matter. Birch was likewise cavalier about the leak of highly-confidential information or potential violation of state law. Birch claimed to have conducted his own investigation into the leak at the NFL. However, Birch also claimed that the term "highly placed NFL source" that told the media about Plaintiff's test results could have referred to anyone even tangentially involved in the NFL, including players, agents, or coaches. Given Birch's definition, it is nothing short of miraculous that he could single-handedly launch a thorough investigation.

Plaintiffs' failed to support their allegations that the NFL leaked Plaintiffs' test results to the media with evidence. Plaintiffs failed to prove by a preponderance of the

evidence that the NFL breached DATWA's confidentiality requirement.

E. Plaintiffs' Request for a Permanent Injunction is Denied.

Plaintiffs seek an injunction, permanently enjoining the NFL from disciplining Plaintiffs as a result of the drug testing and subsequent discipline. DATWA provides that "[a]n employee ... has standing to bring an action for injunctive relief requesting the district court to enjoin an employer or laboratory that commits or proposes to commit an act in violation of sections 181.950 to 181.954." Minn. Stat. § 181.956 (3).

This Court has discretion to issue an injunction if Plaintiffs have proven their case on the merits. *Bio-Une, Inc. v. Burman*, 404 N.W.2d 318, 320 (Minn. Ct. App. J987). "In determining whether permanent injunctive relief is warranted, the district court must first determine whether the plaintiff has proven its case." *Thomas & Betts Corp. v. Leger*, No. A04-260, 2004 WL 2711391, at *25 (Minn. Ct. App. Nov. 24, 2004) (citing *Minn. Pub. Interest Research Group v. Butz*, 358 F. Supp 584, 625 (D. Minn. 1973), *aff'd*, 498 F.2d 13]4 (8th Cir. 1974)). If the court finds that a plaintiff has succeeded on the merits, it must then balance the likelihood of irreparable harm to the plaintiff against the possibility of injury to the defendant and other interested parties as well as any public policy considerations. *Id.*

Plaintiffs failed to establish success on the merits. The Court denies Plaintiffs' request for a permanent injunction and dissolves the temporary injunction that was put in place on December 3, 2008.

II. CONCLUSION

Based on Minnesota law and the facts adduced at trial, Defendant is Plaintiffs' employer for purposes of DATWA. Defendant violated DATWA's three-day notice

requirement. Defendant's drug testing notice policy did not meet or exceed DATWA. However, Plaintiffs admitted that they did not suffer any harm from the delay in notice. Plaintiffs, therefore, may not recover for Defendant's violation. Plaintiffs failed to prove that Defendant violated DATWA's confidentiality provision. Plaintiffs' request for a permanent injunction is denied and this Court's previous temporary injunction is dissolved.

Court File No. 27-CV-08-29778
Judge Gary Larson

STATE OF MINNESOTA
COUNTY OF HENNEPIN
DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Kevin Williams, Pat Williams,

Plaintiffs,

v.

National Football League,

Defendant.

ORDER AND MEMORANDUM OF LAW GRANTING PLAINTIFFS' MOTION TO STAY DISSOLUTION OF TEMPORARY INJUNCTION PENDING APPEAL

The above-entitled matter came for a hearing before the Honorable Gary Larson, Judge of Hennepin County District Court, on May 6, 2010. Steven Rau, Esq., Peter Ginsberg, Esq., and Christina Burgos, Esq., appeared for and on behalf of Plaintiffs, Kevin and Pat Williams. Joseph Schmitt, Esq., appeared for and on behalf of Defendants, the National Football League. Based upon all files, records, and proceedings herein, together with the arguments of counsel,

IT IS HEREBY ORDERED:

1. Plaintiffs Kevin Williams and Pat Williams" Motion to Stay Dissolution of Temporary Injunction Pending

Appeal is **PREMATURE AS THEY HAVE NOT YET FILED A NOTICE OF APPEAL.**

2. If Plaintiffs Williams and Pat Williams timely file a notice of appeal, the Court will grant their motion to stay the Findings of Fact, Conclusions of Law, and Order for Judgment of this Court dated May 6, 2010.

3. The order to stay dissolution of temporary injunction pending appeal will be conditioned upon Plaintiffs posting a supersedeas bond in the amount of $10,000.

4. The attached memorandum is incorporated herein.

BY THE COURT:

Dated: May 21, 2010

s / Gary Larson
Gary Larson
Judge of District Court
C-1655 Government Center
Minneapolis, MN 55487
(612) 348-6102

MEMORANDUM

I. Introduction

On May 6, 2010, this Court issued its Findings of Fact, Conclusions of Law, and Order for Judgment after the matter came before the Court for a trial March 8 - 12, 2010. The parties submitted post-trial briefs and the case was taken under advisement on April 2, 2010.

In its Order, the Court found that the National Football League, ("Defendant"), is Kevin Williams and Pat Williams', ("Plaintiffs"), employer for the purposes of the Drug and Alcohol in the Workplace Act ("DATWA"). The Court also found that Defendant violated DATWA by failing to abide by the Legislature's mandate that employees be given notice of a failed drug test within three days. However, the Court found that Plaintiffs were not damaged by Defendant's DATWA violation in delaying notice of Plaintiffs' positive test results. The Court denied Plaintiffs' request for a permanent injunction and dissolved its temporary injunction.

Plaintiffs have stated their intent to appeal this Court's decision and seek a reinstatement of the temporary injunction pending appeal. Plaintiffs have not, however, filed a notice of appeal or appeal. Plaintiffs instead filed a Motion to Stay Dissolution of Temporary Injunction Pending Appeal with this Court. Defendant opposes the motion.

II. LEGAL ANALYSIS

A. Standard of Review

The trial court may continue an injunction in effect pending appeal, notwithstanding the filing of cost and supersedeas bonds. *David N. Volkmann Const., Inc. v. Isaacs*, 428 N.W.2d 875, 876 (Minn. Ct. App. 1988) (citing *State v. Robnan. Inc.*, 107 N.W.2d 51, 53 (Minn. 1960)). If a stay is permitted, the trial court must establish and approve the

terms of security to protect the respondent. Minn. R. Civ. P. 62.02, 62.03; *see also* Minn. R. Civ. App. P. 108.01, subd. 1 (trial court must approve amount and form of supersedeas bond), 108.01, subd. 4 (on appeal from decision requiring assignment of documents, supersedeas bond may be waived if documents are deposited with officer appointed by trial court). *David N. Volkmann Const.*, 428 N.W.2d at 876.

According to Minnesota Rules of Civil Appellate Procedure Rule 108.02, subd. 1,

> A party seeking any of the following relief must move first in the trial court: (a) a stay of enforcement of the judgment or order of a trial court pending appeal; (b) approval of the form and amount of security, if any, to be provided in connection with such a stay; or (c) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending pursuant to Minn. R. Civ. P. 62.02.

Minnesota Rule of Civil Procedure 62.02 also provides for the granting of an injunction pending appeal. It states,

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Minn. R. Civ. P. 62.02.

When determining whether or not to grant a stay pending appeal, the trial court must balance the appealing party's interest in preserving the status quo, so that effective relief will be available if the appeal succeeds, against the interests of the public or the prevailing party in enforcing the decision and ensuring that they remain "secure in victory"

while the appeal is pending. *DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 144 (Minn. Ct. App. 2007).

"The party seeking a stay pending appeal must show (1) that it is likely to succeed on the merits; (2) that it will suffer irreparable injury unless the stay is granted; (3) that no substantial harm will come to other interested parties; and (4) that the stay will do no harm to the public interest." *James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544 (8th Cir. 1982) (citation omitted); see *Arkansas Peace Ctr. v. Arkansas Dept. of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993). "Thus, the factors considered in evaluating [defendant's] motion are virtually identical to those considered in assessing the initial motion for a preliminary injunction." *Metro Networks Commc'ns Ltd. P'ship v. Zavodnick*, No. Civ. 03-6198, 2004 WL 73591, at *3 (D. Minn. Jan. 15, 2004) (citing *United Healthcare Ins. Co. v. AdvancePCS*, Civ. No. 01-2320, 2002 WL 519720, at *1 (D. Minn. Mar. 22, 2002)).

Minnesota Rule of Civil Procedure 62.02 only applies when the party seeking a stay has filed an appeal. Plaintiffs' Motion to Stay Dissolution of Temporary Injunction Pending Appeal is premature because Plaintiffs have not yet filed an appeal or notice of appeal. However, when Plaintiffs file such an appeal, the Court will grant their motion based on the following analysis.

B. This Court may exercise its discretion to grant a stay.

In exercising its discretion to grant a stay of dissolution of the temporary restraining order, this Court must balance Plaintiffs' interests in preserving the status quo against Defendant's interest in enforcing discipline against Plaintiffs. The Court must determine if Plaintiffs are likely to succeed on the merits, will suffer irreparable injury unless the stay is granted, if substantial harm will come to other interested

parties, and whether the stay will harm the public interest. Each factor is discussed below.

1. Plaintiffs are likely to succeed on the merits.

Plaintiffs have a likelihood of success on the merits. Plaintiffs have the burden on appeal to prove that the trial court made an error of fact or law. *Graffius v. Control Data Corp.*, 447 N.W.2d 215, 216 (Minn. Ct. App. 1989). Typically, the likelihood of success on the merits is the most significant factor. *S & M Constructors, Inc. v. Foley Co.*, 959 F.2d 97, 98 (8th Cir. 1992). In order to satisfy the "likelihood of success" factor, the moving party does not have to establish "'absolute certainty of success,'" but only "that they are 'likely' to succeed on the merits." *Iowa Utils. Bd. v. F.C.C.*, 109 F.3d 418, 423 (8th Cir. 1996) (quoting *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986)). Further, to prove that it is likely to succeed on the merits on appeal, a party does not need to prove that there is a greater than fifty-percent chance that it will prevail on the merits. *Knutson v. AG Processing, Inc.*, 302 F.Supp.2d 1023, 1035 (N.D. Iowa 2004) (citing *Dataphase Sys. Inc. v. C L Sys. Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). "[A]t a minimum, the movant is required to show 'serious questions going to the merits.'" *Id.* (quoting *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

The DATWA issues facing this Court were a matter of first impression. There is no case law that was able to guide this Court. It was assumed, throughout this case, that the Court's decision would be appealed by one or both parties. The Court found that Defendant violated Plaintiffs' rights under DATWA by failing to give notice of Plaintiffs' test results within three days. However, this Court also found that Plaintiffs were not harmed by Defendant's DATWA violation.

An employee, whose rights were violated under DATWA, is entitled to damages and other equitable relief, including ordering that the injured employee be reinstated. Minn. Stat. § 181.956. "In addition to any other remedies provided by law, an employer or laboratory that violates sections 181.950 to 181.954 is liable to an *employee or job applicant injured by the violation* in a civil action for any damages allowable at law." Minn. Stat. § 181.956 (emphasis added). The Court found that Plaintiffs were not injured by Defendant's violation based on Plaintiffs' own testimony.

Public policy, however, dictates that Defendant should not be permitted to benefit from its own misconduct. *See, e.g., Ganley Bros. v. Butler Bros. Bldg. Co.*, 212 N.W. 602, 603 (Minn. 1927) (refusing to enforce, based on public policy, a party's attempt to escape his own fraud); *Yates v. Hanna Min. Co., Inc.*, 365 N.W.2d 783, 787 (Minn. Ct. App. 1985) (finding that a contract which purported to delegate an employer's obligation to provide a safe environment for employees was ineffective to shield the employer from his own negligence). Here, Defendant knew Star Caps contained Bumetanide, that players were ingesting Bumetanide, that Bumetanide was dangerous, and withheld information about Star Caps, knowing that players would suffer as a result. Defendant created a trap that it knew would result in violations of the program.

Violations of public policy and violations of statutes are inextricably linked because statutes are one way in which states set forth their public policy. "Public policy, where the legislature has spoken, is what it has declared that policy to be. So far as the question of policy is concerned, [the] statute settles the matter." *Thompson v. Allstate Ins. Co.*, 412 N.W.2d 386, 388-89 (Minn. Ct. App. 1987). This case presents pressing issues of an important state law designed to protect employees. Guidance in the consistent application of DATWA is needed, and Plaintiffs' may prevail on appeal.

This Court has no delusions of grandeur and has had on previous occasions been reversed by the Court of Appeals and Supreme Court.

Regardless of Plaintiffs' likelihood of success on the merits, the Court must consider the other factors in granting a stay. "The court need not, however, address the merits of the parties' respective positions because the court finds that all three of the remaining factors weigh decisively in favor of [the stay]." *Twin Cities Galleries, LLC v. Media Arts Group, Inc.*, 431 F.Supp.2d 980, 983 (D. Minn. 2006) (citing Watt, 680 F.2d at 544). Because the other factors weigh heavily in Plaintiffs" favor, their likelihood of success on the merits is not determinative of whether the Court should stay the dissolution of the temporary restraining order.

2. Plaintiffs will suffer irreparable harm unless the stay is granted.

Plaintiffs will suffer irreparable harm if they are suspended before the appeal process is exhausted. The United States Supreme Court stated that a professional basketball player would suffer irreparable injury if he could not continue playing because a significant part of his career "will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high-level competition, his public acceptance as a super star will diminish to the detriment of his career, his self-esteem and pride will have been injured and a great injustice will be perpetrated on him." *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205 (1971).

Courts have found that loss of NFL playing time is also sufficient to constitute irreparable harm. *See Jackson, et. al. v. Nat'l Football League*, 802 F.Supp. 226, 231 (D. Minn. 1992) (finding that "[t]he existence of irreparable injury is underscored by the undisputed brevity and precariousness of the players" careers in professional sports, particularly in the NFL"); *Bowman v. Natl'l Football League*, 402 F.Supp. 754,

756 (D. Minn. 1975) (stating that, without injunctive relief, a professional football player would "suffer irreparable harm, not compensable in terms of damages, and that the court's capacity to do justice will thereby be rendered futile"); *Denver Rockets v. All-Pro Mgmt.*, Inc., 325 F.Supp. 1049, 1057 (C.D. Cal. 1971) (stating that the professional basketball player will suffer greater harm than that of the NBA).

In this case, because the NFL playing season is relatively short, Plaintiffs would suffer a significant loss of playing time without the benefit of a stay. The loss of four games is considerable, given the relatively short season for professional football and the limited number of years remaining in Plaintiffs" football careers. Plaintiffs" ability to make the Pro Bowl and, ultimately have a fair opportunity for the Hall of Fame will be jeopardized if they are suspended. Moreover, Plaintiffs" reputations and standing in the community will be forever compromised.

The Court is satisfied that Plaintiffs would suffer irreparable harm absent a stay of the dissolution of the injunction.

3. No substantial harm will come to the NFL.

The NFL will not be substantially harmed by a stay of dissolution of the temporary restraining order pending appeal. Defendant argues that it will suffer irreparable harm. Defendant claims that granting a stay pending appeal would send the wrong message to young fans and skew the competition. Defendants also argue that a stay would pose a disadvantage to other players who attained their playing weight without using banned substances, as well as other teams whose players already served their suspensions for using Bumetanide or other prohibited substances.

Defendant could have easily avoided this very situation by informing players or teams about what it already knew – that Star Caps contained a hidden, dangerous substance. Defendant knew that many players were already inadvertently ingesting Bumetanide, and continued to place the health, safety, and welfare of its players in jeopardy, so that Adolpho Birch could play a game of gotcha. The league clearly allowed a half dozen other players to use Bumetanide without punishment. Granting a stay pending appeal would not cause Defendant irreparable harm, it would only affect Defendant's ability to immediately sanction Plaintiffs and would not affect the general enforceability its anti-doping policy. This Court finds that Defendant would suffer no harm by the continued imposition of an injunction during appeal.

4. Granting the stay will not harm public interest.

Granting a stay of dissolution of the temporary restraining order will benefit public interests. DATWA is a statute reflecting the public policy of the State of Minnesota. *Nat'l Football League Players Ass'n v. Nat'l Football League*, Civ. No. 08-6254, 2009 WL 1457007, at *10 (D. Minn. May 22, 2009). "Public policy, where the legislature has spoken, is what it has declared that policy to be. So far as the question of policy is concerned, [the] statute settles the matter." *Thompson v. Allstate Ins. Co.*, 412 N.W.2d 386, 388-89 (Minn. Ct. App. 1987).

Entering a stay pending appeal will allow the Minnesota Court of Appeals or the Supreme Court to review the case on the merits and ensure that the legislative will and public policy is served as best as possible.

The Court has balanced the factors under *DRJ*, 741 N.W.2d 141 and Watt, 680 F.2d 543. It is clear that Plaintiffs will suffer irreparable injury unless the stay is granted, that no substantial harm will come to Defendant, and that the stay will do no harm to the public interest. In sum, the Court

concludes that these factors clearly support granting Plaintiffs' Motion to Stay Dissolution of Temporary Injunction Pending Appeal. After Plaintiffs file a notice of appeal, the Court will grant their motion.

C. The stay is conditioned upon Plaintiff's posting a supersedeas bond.

The trial court has a large degree of discretion regarding the issuance of a stay and the conditions under which a stay is granted. *See, Matson v. Matson*, 310 N.W.2d 502 (Minn. 1981). The amount of security required for a stay is ultimately a matter for the Court's discretion. *See, e.g., No Power Line Inc., v. Minn. Envtl. Quality Council*, 262 N.W.2d 312, 331-32 (Minn. 1977) (explaining that an unsecured stay should be granted only in rare circumstances).

The Court, therefore, sets a supersedeas bond in the amount of $10,000. A stay of dissolution of the temporary injunction pending appeal will be entered and in effect until appellate review in this matter is exhausted. Plaintiffs are required to post a supersedeas bond in the amount of $10,000.

III. CONCLUSION

Plaintiffs have not yet filed an appeal or a notice of appeal. As such, their Motion to Stay Dissolution of Temporary Injunction Pending Appeal is premature. Assuming that Plaintiffs file an appeal, this Court has the discretion to grant a stay. Plaintiffs have shown some likelihood of success on the merits. More importantly, Plaintiffs have amply demonstrated that they would suffer irreparable injury unless the stay is granted, that Defendant will not be substantially harmed, and that the stay will not harm the public interest. Based on these factors, the stay of dissolution of the temporary injunction should be granted. After Plaintiffs file their notice of appeal and post a

supersedeas bond in the amount of $10,000, the Court will grant their motion.

No. A10-922

STATE OF MINNESOTA
IN COURT OF APPEALS

Kevin Williams and Pat Williams,

Appellants,

v.

National Football League,

Respondent.

THE NATIONAL FOOTBALL LEAGUE'S MOTION TO DISMISS THE APPEAL AS MOOT

TO: Clerk of Appellate Courts; Appellants above-named and their attorneys, Peter Ginsberg, Ginsberg & Burgos PLLC, 12 East 49th Street, 30th Floor, New York, NY 10017; and Steven Rau, Flynn, Gaskins, Bennett, LLP, 333 South 7th Street, Minneapolis, MN 55402

MOTION TO DISMISS THE APPEAL AS MOOT

Final judgment in this case was entered in favor of the National Football League ("NFL") on June 7, 2010, and the 60-day period for appealing that judgment has come and gone. Now that there is a "final determination of the rights of the parties" in this action, Minn. R. Civ. P. 54.01, "there is no injury that [this] [C]ourt can redress" in connection with the instant appeal from the district court's injunction order, *City of West St. Paul v. Krengel*, 748 N.W.2d 333, 338 (Minn. Ct. App. 2008). The NFL thus respectfully requests, pursuant to Rule 127 of the Minnesota Rules of Appellate Procedure, that this Court dismiss the above-captioned appeal and vacate the district court's stay order "for lack of justiciability." *Id.*

STATEMENT OF THE CASE

As discussed in full detail in the NFL's merits brief on appeal, this case is about two professional football players who admittedly violated the collectively-bargained Policy on Anabolic Steroids and Related Substances ("Policy") and were suspended as a result. The players subsequently brought suit against the NFL seeking compensatory damages, punitive damages, and injunctive relief. (A0019-38.)[2]

After a week-long trial, the court below concluded that Plaintiffs had "failed to establish success on the merits." (Add.027.) In its May 6, 2010 order, it dissolved its prior temporary injunction against Plaintiffs' suspensions; it refused Plaintiffs' request to enjoin their suspensions permanently; it denied Plaintiffs' request for an award of

[2] Citations appearing as Add.xxx are to the Appellants' Addendum; citations appearing as Axxxx are to the Appellants' Appendix; and citations appearing as RAxxxx are to the Respondent's Appendix.

money damages; and it ordered that judgment be entered for the NFL. (Add.015.)

On May 25, 2010, before the entry of final judgment, Plaintiffs appealed from the district court's injunction order alone. (A0397.) In their notice of appeal, Plaintiffs specifically indicated that they were relying on Rule 103.03(b) of the Minnesota Rules of Civil Appellate Procedure (*id.*), which allows an appeal from an order denying injunctive relief, Minn. R. Civ. App. P. 103.03(b). Plaintiffs then moved the district court to stay dissolution of the temporary injunction pending appeal, and the district court granted their motion. (A0369-0379.)

The district court entered final judgment on June 7, 2010. (RA0061.) In a June 23, 2010 order denying the NFL's motion to expedite, this Court recognized that the instant appeal "is taken only from the May 6, 2010 order denying injunctive relief. *The players have not perfected an appeal from a final judgment on the merits.*" (RA0053-0056 (emphasis added).) Plaintiffs had 60 days from the entry of final judgment – or until August 6, 2010 – to perfect such an appeal. Minn. R. Civ. App. P. 104.01; *see also T.A. Schifsky & Sons v. Bahr Constr. LLC*, 773 N.W.2d 783, 788 n.5 (Minn. 2009) ("The 60-day requirement is mandatory."). They never did.

ARGUMENT

I. PLAINTIFFS' APPEAL FROM THE INJUNCTION ORDER SHOULD BE DISMISSED FOR LACK OF JUSTICIABILITY.

"A case is moot if there is no justiciable controversy." *Krengel*, 748 N.W.2d at 338 (citing *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005)). "Generally, when an event occurs that makes . . . an award of effective relief impossible, the appeal should be dismissed as moot." *Mertins v. Comm'r of Natural Res.*, 755 N.W.2d 329, 334 (Minn. Ct. App. 2008)

(citing *In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997)); *see also Krengel*, 748 N.W.2d at 338 (recognizing that because "[a]ppellate courts 'decide only actual controversies and avoid advisory opinions,' . . . when there is no injury that a court can redress, the case must be dismissed for lack of justiciability") (quoting *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999)).

The judgment against Plaintiffs on all of their claims represents a "*final determination of the rights of the parties*," Minn. R. Civ. P. 54.01 (emphasis added), and prevents Plaintiffs from obtaining permanent injunctive relief, which would have been available only if Plaintiffs had prevailed on the merits, *see, e.g.*, *Bio-Line, Inc. v. Burman*, 404 N.W.2d 318, 320 (Minn. Ct. App. 1987); *Thomas & Betts Corp. v. Leger*, No. A04-260, 2004 WL 2711391, at *25 (Minn. Ct. App., Nov. 24, 2004) ("In determining whether permanent injunctive relief is warranted, the district court must first determine whether the plaintiff has proven its case.") (Gray Aff., Ex. A). It would be "impossible" for this Court to issue "an award of effective relief" on appeal from the district court's order refusing to enjoin Plaintiffs' suspensions, *Mertins*, 755 N.W.2d at 334, given the trial court's unchallenged judgment against Plaintiffs on the merits of their claims.

To allow Plaintiffs to proceed with their efforts to permanently enjoin their suspensions also would undercut the "[p]ublic policy favor[ing] the finality of judgments and the ability of parties to rely on court orders." *Nussbaumer v. Fetrow*, 556 N.W.2d 595, 599 (Minn. Ct. App. 1996). The Minnesota Supreme Court has long held that a "judgment of a court of competent jurisdiction, after the expiration of the time of appeal, cannot be impeached." *Sache v. Wallace*, 112 N.W. 386, 387 (Minn. 1907); *see also Dieseth v. Calder Mfg. Co.*, 147 N.W.2d 100, 103 (Minn. 1966) (holding that even if a district court decision is wrong, it is still final after the time

for appeal has expired). A decision from this Court affording Plaintiffs relief from their suspensions in the face of a final judgment against them would do just that.

A. Minnesota Appellate Courts Have Repeatedly Granted Motions To Dismiss An Appeal Where, As Here, There Is An Unchallenged Final Judgment.

Minnesota appellate courts have consistently granted motions to dismiss an appeal from an order where, as here, the final judgment has not been appealed. In *Stockwalk Group, Inc. v. Taylor*, No. A06-1971, 2007 WL 2417153 (Minn. Ct. App., Aug. 28, 2007) (Gray Aff., Ex. B), for example, appellants challenged the district court's denial of their motion to temporarily enjoin respondents-attorneys from representing an adverse party in an arbitration matter. After that appeal was filed, an arbitration award was entered against appellants, "the decision went unchallenged, and the arbitration award [was] paid in full." *Id.* at *2. Respondents subsequently moved to dismiss the appeal from the injunction order and this Court granted the motion, holding that "mootness precludes our consideration" of the representation issues. *Id.* at *3.

The Minnesota Supreme Court's decision in *Sisto v. Housing and Redevelopment Authority of Duluth*, 104 N.W.2d 529 (Minn. 1960), is also on point. There, the district court denied plaintiffs' application for a temporary injunction and ordered plaintiffs to furnish a surety bond, providing that if no bond was filed the case would be dismissed with prejudice. *Id.* at 530. Plaintiffs appealed the order denying the injunction and the bond order, but never filed a surety bond. *Id.* After the case was dismissed with prejudice and final judgment had been entered against plaintiffs, the Supreme Court granted defendant's motion to dismiss the appeals from the injunction and the bond order because "all issues involved therein are now moot . . . . *there*

is nothing for us to review." *Id.* at 532 (emphasis added); *see also Sweeney v. Village of Ellsworth*, 159 N.W. 1067, 1068 (Minn. 1916) (holding that appeal from order striking pleading as sham and frivolous "presents a moot question only, because after the appeal was taken the case came on for trial in the court below, and was dismissed for want of prosecution"); *Breslaw v. Port Authority of St. Paul*, 135 N.W.2d 127, 127 (Minn. 1965) (granting respondent's motion to dismiss appellant's challenge to injunction order given that judgment had been entered and appellant failed to "appeal[] from the judgment within the time permitted").

Because here, as in those cases, there is "nothing for [this Court] to review" now that final judgment against Plaintiffs has been entered and the time for appealing that judgment has expired, *Sisto*, 104 N.W.2d at 532, this Court should dismiss Plaintiffs' appeal from the injunction order as moot.

B. None Of The Exceptions To The Mootness Doctrine Applies Here.

While an appeal will not be dismissed if "the issue raised is capable of repetition yet evading review," *Krengel*, 748 N.W.2d at 338, this case does not fit within that "narrow exception to the mootness rule," *Northern States Power Co. v. Minnesota Dep't of Transp.*, Nos. C0-01-1471, C5-01-1918, 2002 WL 555163, at *2 (Minn. Ct. App., Apr. 16, 2002) (Gray Aff., Ex. C); *see also Krengel*, 748 N.W.2d at 340 ("[W]e naturally hesitate to make an exception to mootness . . . ."). The "capable-of-repetition-yet-evading-review" exception applies only "if (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Krengel*, 748 N.W.2d at 339 (internal quotations and citations omitted).

The challenged injunction order in this case was *not* "too short to be fully litigated prior to its cessation or expiration," *Krengel*, 748 N.W.2d at 339 – in fact, the district court granted Plaintiffs' motion to stay the dissolution of the prior injunction against their suspensions pending appeal. The appeal from the injunction order would have been heard had Plaintiffs filed an appeal from the final judgment. Plaintiffs' failure to appeal the judgment is all the more remarkable because this Court in its June 23, 2010 order specifically alerted Plaintiffs to the fact that they had not yet "perfected an appeal from a final judgment on the merits." (RA0053-0056.)

In *Krengel*, by contrast, the court carved an exception to the mootness doctrine because the permanent injunction expired by its own terms before an appeal from the injunction could be heard. 748 N.W.2d at 339 (noting that the permanent injunction's nine-month lifespan was "too short to allow the judicial process to reach conclusion"). The *Krengel* plaintiff "was unable to obtain appellate review of the permanent injunction before it expired *despite having made three vigorous efforts to do so*." *Id.* at 340 (emphasis added). An exception is unwarranted here, where Plaintiffs had every ability "to obtain appellate review of the injunction order," but made *no* "efforts to do so." *Id.*

This also is not a case in which there is "a reasonable expectation that the same complaining party would be subjected to the same action again." *Krengel*, 748 N.W.2d at 339. There is no reason to expect that Pat and Kevin Williams would test positive a second time for a substance banned by the NFL Policy. Moreover, Pat Williams has stated that he is "seriously consider[ing]" retiring at the end

of this season, when his contract expires[3] – further diminishing the chance "that the same complaining party would be subjected to the same action again." *Krengel*, 748 N.W.2d at 339.

Finally, while this Court will "'decide issues that are technically moot when the issue is functionally justiciable and one of public importance and statewide significance,'" *State v. Matthews*, 779 N.W.2d 543, 548 (Minn. 2010) (quoting *Jasper v. Comm 'r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn. 2002)), this Court already has decided that "[t]his appeal does not involve issues of statewide importance" (RA0055).

C. Plaintiffs' Rule 103.04 Argument Is Groundless.

In their Reply Brief, Plaintiffs rely on Rule 103.04 of the Minnesota Rules of Civil Appellate Procedure in arguing that this Court has jurisdiction over this appeal despite their failure to appeal the final judgment. (Appellants' Reply Brief, p. 10.) Plaintiffs' position is unavailing. While Rule 103.04 states that this Court may review any matter that "the interest of justice may require," language added to that rule in 1998 "suggests that *the rule should be read narrowly.*" *In re Welfare MR.*, No. C4-02-446, 2002 WL 31655025, at *8 (Minn. Ct. App., Nov. 26, 2002) (emphasis added) (declining to review whether judicial notice ruling was proper where appellant failed to object to ruling at trial) (Gray Aff., Ex. D). The added language provides:

> *The scope of review afforded may be affected by whether proper steps have been taken to preserve issues for review on appeal,*

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3 *'Daaaaad' Pat Williams: 'We've got to win it this year'*, available at http://www.startribune.com/sports/vikings/102168439.html?elr=KArksi8cyaiU9PmP:QiUiD3aPc:_Yyc:aUU.

> *including the existence of timely and proper post-trial motions.*

Minn. R. Civ. App. P. 103.04 (emphasis added); *see also Swarthout v. Mutual Serv. Life Ins. Co.*, 632 N.W.2d 741, 747 n.2 (Minn. Ct. App. 2001) ("While [Rule 103.04] states that an appellate court may address any issue 'as the interests of justice requires[,]' the 1998 amendment to that rule requires consideration of whether 'proper steps have been taken to preserve issues for review on appeal.").

Here, where Plaintiffs neglected to appeal the final judgment even after this Court specifically advised them of their failure to do so, "proper steps" were *not* taken to "preserve issues for review on appeal." Minn. R. Civ. App. P. 103.04. Plaintiffs have cited no case – and the NFL is aware of none – in which a court declined on the basis of Rule 103.04 to dismiss an appeal that was otherwise moot.[4] In fact, recently in *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2009), the Minnesota Supreme Court held that notwithstanding Rule 103.04, the district court's denial of summary judgment was unreviewable "because the district court's decision at the summary judgment stage that there was a genuine dispute of fact becomes moot once the jury reaches a verdict on that issue." *Id.* at 918; *see also City of North Oaks v. Sarpal*, 784 N.W.2d 857, 861 (Minn. Ct. App. 2010) ("Although an appellate court has the authority to review orders that affect the judgment being appealed under Minn. R. Civ. App. P. 103.04, the denial of a motion for summary judgment . . . 'becomes moot once the jury reaches

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[4] While the *Matthews* court, citing Rule 103.04, exercised its discretion to address "'technically moot" issues "'of public importance and statewide significance,'" *Matthews*, 779 N.W.2d at 549 (quoting *Jasper*, 642 N.W.2d at 439), that well-recognized exception to the mootness doctrine, as discussed above, is inapplicable here.

a verdict on the issue.") (quoting *Bahr*, 766 N.W.2d at 918).[5] Thus, "[although the appeal statutes are liberally construed so that the right of appeal be not foreclosed, this court cannot assume jurisdiction where there is none." *Indep. Sch. Dist. No. 857 v. Seem*, 116 N.W.2d 395, 398 (Minn. 1962).

In the end, to allow Plaintiffs to go forward with their appeal would constitute a prohibited attack on a final judgment. *See Nussbaumer*, 556 N.W.2d at 599 ("Minnesota law does not permit the collateral attack on a judgment valid on its face."). Were Plaintiffs successful in obtaining a reversal of the district court order and an injunction against their suspensions, the judgment's "final determination of the rights of the parties," Minn. R. Civ. P. 54.01, would have no meaning – devastating the "ability of parties to rely on court orders," *Nussbaumer*, 556 N.W.2d at 599.[6] Minnesota's well-established rule that a "judgment of a court of competent jurisdiction, after the expiration of the time of appeal, cannot be impeached," *Sache*, 112 N.W. at 387,

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[5] Moreover, Rule 103.04 states that "[o]n appeal from or review of an *order* the appellate courts may review any *order* affecting the order from which the appeal is taken and on appeal from a *judgment* may review any *order* involving the merits or affecting the judgment." Minn. R. Civ. App. P. 103.04 (emphasis added). It does not, contrary to what Plaintiffs suggest, state that on appeal from an *order* an appellate court may review the *judgment* affecting the order from which the appeal is taken.

[6] Had Plaintiffs appealed the final judgment, the NFL might have adopted a different appellate strategy – possibly choosing, for example, to file a notice of related appeal to obtain review of the district court's earlier decisions in this case. *See* Minn. R. Civ. App. P. 106. While Plaintiffs in their Reply Brief fault the NFL for not having taken a "cross-appeal from the trial court's factual and legal finding that it violated DATWA" (Appellants' Reply Brief, p. 1), the NFL had no reason to appeal an unchallenged judgment in its favor.

prevents this Court from entertaining Plaintiffs' request for injunctive relief.

II. THE DISTRICT COURT'S STAY ORDER ALSO SHOULD BE VACATED ON THE SAME GROUNDS.

As discussed above, the unchallenged final judgment against Plaintiffs on all of their claims makes it impossible for them to obtain permanent injunctive relief on appeal. For all the same reasons, there no longer is any basis for the district court's decision to stay dissolution of the temporary injunction pending appeal. At bottom, Plaintiffs are entitled to neither temporary nor permanent relief from their suspensions now that there is a final judgment that they have "failed to establish success on the merits." (Add.027.)

See Bio-line, 404 N.W.2d at 320 (holding that plaintiffs could not obtain permanent injunctive relief because they had not established a "right to such relief" at trial); *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 165 (Minn. Ct. App. 1993) (holding that temporary injunctive relief was unavailable to plaintiff who had "shown no likelihood it will win this case"). The district court's stay order thus should be vacated as well.

CONCLUSION

Because the final judgment against Plaintiffs bars them from obtaining "effective relief," *Mertins*, 755 N.W.2d at 334, the NFL respectfully requests that this Court dismiss the appeal from the district court's May 6, 2010 injunction order and vacate the district court's stay pending appeal.

DATED: September 8, 2010 Respectfully submitted,

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